85-941

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ZIMMER PAPER PRODUCTS INCORPORATED,

Petitioner,

vs.

BERGER & MONTAGUE, P.C.; David Berger; GROSS & SKLAR ASSOCIATES; WARREN RUBIN; RAWLE & HENDERSON; Avram G. Adler; Marvin I. Barish; Arnold Levin; Howard J. Creskoff; KOHN, SAVETT, MARION & GRAF, P.C.; Harold Kohn; FINE, KAPLAN & BLACK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Did the United States Court of Appeals for the Third Circuit err in holding that class counsel in a class action litigation had satisfied their attorney-client fiduciary obligations to notify absent class members of their right to participate in a settlement fund, merely by complying with the due process notification requirements provided by Federal Rule of Civil Procedure 23(e)?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit ("Court of Appeals"), is reported at 758 F.2d 86 (3d Cir. 1985), and appears in the Appendix hereto. The opinion of the United States District Court for the Eastern District of Pennsylvania ("District Court") is reported at 586 F. Supp. 1555 (E.D. Pa. 1984) and also is reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1985. Petitioner timely filed a petition for rehearing in banc which was denied on April 19, 1985. This petition for a writ of certiorari was filed within ninety (90) days of the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY, CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULE OF CIVIL PROCEDURE 23:

The text of Rule 23 is set forth in full in the Appendix at page A-41.

STATEMENT OF THE CASE

This is an appeal of an action for negligence in which the District Court granted motions for summary judgment filed by Defendants/Respondents (hereinafter referred to collectively as "Class Counsel"). Although this controversy was initiated by Petitioner as a negligence action in which federal jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332(a)(1), the issue which brings it

before this Court involves the attorney-client obligations and duties of class counsel to class members in class action litigation and, as such, is of great importance to the administration and creditability of federal class actions in general, an issue which has not been, but should be, settled by this Court.

Zimmer Paper Products Incorporated ("Zimmer"), Petitioner herein, is engaged in the business of converting paper products and printing and laminating papers for food and industrial packaging applications. Zimmer was a member of the plaintiff class in the *In Re: Glassine and Greaseproof Paper Antitrust Litigation*, Master File No. 80-914, M.D.L. No. 475, in the District Court ("Antitrust Litigation"). The plaintiff class in the Antitrust Litigation is hereinafter referred to collectively as "Class Members" and the individual class members as "Class Member." Class Counsel served as counsel to the Class Members in the Antitrust Litigation.

Zimmer sought monetary damages from Class Counsel to compensate Zimmer for the loss it incurred, as a result of its inability to share in the settlement fund of approximately Twenty Million Seven Hundred Thousand Dollars ($20,700,000.00) generated in the Antitrust Litigation ("Settlement Fund"), caused by Class Counsel's negligent failure to discharge their fiduciary obligations, as attorneys for the Class Members, to recommend and utilize effective methods to notify their clients of the deadline for filing a claim, and Class Counsel's negligent execution, and delegation of the execution, of the notification process.

The essence of the arguments advanced by Class Counsel in their motions for summary judgment was that they had discharged all duties which they owed to Zimmer and other Class Members to notify them of their right to participate in the Settlement Fund by employing a notification process consisting of a single first-class mailing and a one-time publication in *The Wall Street Journal*, which process it

was asserted insulated Class Counsel from all liability to Class Members because it complied with the order of the District Court issued to satify the due process requirements of Federal Rule of Civil Procedure 23(e) ["Rule 23 (e)"].[1] Class Counsel also asserted that (i) there was no evidence that Class Counsel were negligent in the execution, or the delegation of the execution, of the notification process, and (ii) there was no evidence that Class Counsel's negligence caused Zimmer to fail to file a claim.

In the posture of this case at this time, it is undisputed that:

> (i) there were a relatively small number of Class Members [approximately one thousand five hundred (1,500)],
>
> (ii) only twelve percent (12%) of the Class Members responded to the "Notice of Hearing on Proposed Additional Settlement and Proposed Plan of Distribution of the Settlement Fund" ("November 10 Notice") which gave notice to Class Members of their right to file a claim to participate in the Settlement Fund,
>
> (iii) Zimmer never received the November 10 Notice, and
>
> (iv) Zimmer did not file a claim within the time prescribed in the November 10 Notice.

Appendix at A-15 n.1. Additionally, by reason of the manner in which the list of potential class members was assembled (sales invoices and records of the defendants in the Antitrust Litigation), Class Counsel should have known that Zimmer had a claim of some Two Hundred Forty-Five Thousand Dollars ($245,000.00). Faced with the foregoing

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[1] Federal Rule of Civil Procedure 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e).

facts, Class Counsel, nevertheless, chose to recommend to the District Court and to rely upon a single first-class mailing and a one-time publication to communicate this critical notice to absent Class Members.

The District Court accepted Class Counsel's positions completely, granted the motions for summary judgment, and, ignoring the attorney-client duty of Class Counsel to advocate and pursue a more stringent method of notice, held that Class Counsel had no duty to absent Class Members to notify and advise them of their right to participate in the Settlement Fund, other than to carry out the order of the District Court issued to comply with Rule 23(e) due process requirements.

Zimmer appealed to the Court of Appeals which affirmed the decision of the District Court by a two to one majority. In rejecting Zimmer's assertion that Class Counsel breached its attorney-client fiduciary duties by disseminating the November 10 Notice using only a single first-class mailing and publication, the majority stated that, although a requirement of certified mail or follow-up procedures "might have been preferable", where Class Counsel employed a customary, court-approved procedure and where no alternative method of notice was presented for the District Court's consideration, Class Counsel cannot be said to have breached their duties. Appendix at A-12 to A-13.

REASON FOR GRANTING THE WRIT

This case raises an important issue of first impression which should be addressed and resolved by this Court involving the extent to which class counsel, apart from his obligations as an officer of the court to assist the court in its compliance with the Federal Rules of Civil Procedure and the constitutional requirements of due process, owes substantive fiduciary duties to absent class members, his clients, to effectively notify and communicate with them concerning their rights to participate in a settlement fund

generated in the class action. The extreme prejudice which results to an absent class member from his failure to receive notice of a settlement of the class litigation is obvious. In addition to being deprived of the right to share in the class recovery, the settlement binds the absent class member and precludes him from obtaining any redress from the settling defendant for the injury caused by the settling defendant. The obligations of class counsel to class members should encompass all those duties traditionally imposed on an attorney in any attorney-client relationship.

That an attorney owes a strict fiduciary duty to those he represents has been firmly established by courts at all levels. See, for example, *Fund of Funds Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *Littell v. Morton*, 369 F. Supp. 411 (D. Md. 1974), *aff'd*, 519 F.2d 1399 (4th Cir. 1975); *Bar Association of Baltimore City v. Marshall*, 269 Md. 510, 307 A.2d 677 (1973); *In re Wright*, 131 Vt. 473, 310 A.2d 1 (1973). To date, however, no court has defined or delimited a workable standard of conduct against which class counsel's fiduciary obligation to absent class members can be measured.

In describing the level of conduct required of an attorney with respect to his client, the Court of Appeals for the Second Circuit has stated, "it is beyond a doubt that a lawyer is bound to conduct himself as a fiduciary...of his or her client's interests, and that he or she must exercise his utmost good faith, honesty, integrity, and fidelity." *Fund of Funds*, 567 F.2d at 233 n.16. In all dealings with his client, the attorney has a burden of responsibility that is uncommon to an ordinary citizen, and that duty does not begin or end with the attorney-client relationship, but embraces duties as a fiduciary. *In re Wright*, 131 Vt. 473, 310 A.2d 1 (1973).

The fiduciary relationship between an attorney representing the absent class members of a diverse class of shareholders was recognized by Judge Learned Hand in *Berner v. Equitable Office Bldg.*, 175 F.2d 218 (2d Cir.

1949), in which he said such an attorney "was in a fiduciary relation, not only as to his particular clients, whoever they were, but as to all the shareholders." *Id.* at 220.[2] Moreover, the Court of Appeals itself has recognized that the relationship between class counsel and absent class members is a special one: "...in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court." *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973).

The basis for the imposition of such a fiduciary duty on class counsel lies in the preclusive, *res judicata* effect that the resolution of a class action has on all members of the class. Individual class members who do not opt out of the class pursuant to Federal Rule of Civil Procedure 23(c)(2) are bound by the judgment in the class action and, whether or not they participate in any recovery, are precluded from pursuing their own individual claim against the class action defendant. Consequently, in order to meet its duty to adequately represent the class, class counsel must protect the rights and interests of absent class members "vigorously, tenaciously and effectively" at every stage of the proceeding. *Johnson v. Shreveport Garment Company*, 422 F.Supp. 526, 534 (W.D. La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978).

One aspect of the attorney's duty to his client, which has been recognized by this Court is the duty to promptly inform the client of matters that affect his interests. *Baker v. Humphrey*, 101 U.S. 494 (1880). In the normal attorney-client situation, there is a great deal of communication and informational exchange between the attorney and the

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[2] *See also Young v. Higbee Co.*, 324 U.S. 204 (1944) (person who undertakes to act on behalf of class becomes representative of whole class); *Silbiger v. Prudence Bonds Corporation*, 180 F.2d 917 (2d Cir. 1950) (attorney representing two or three holders of a series of bonds owed duty to all bondholders in that series).

client concerning facts of the case, the client's involvement, matters of strategy, and the status of the proceedings. In a typical class action, however, the situation is radically different. There is little, if any, communication between non-representative members of the class and class counsel. This is true even though, because of its binding effect, the class action is precisely the type of action in which communication between attorney and client is most critical. Most classes consist of a large number of widely dispersed parties with claims of differing amounts. Since few of these parties are before the court, their attorney, class counsel, has the obligation to establish and maintain procedures for effectively communicating with these absent class members to advise them of the status of the proceedings. In foregoing any right they may have to pursue an individual claim against the defendant, absent class members are justifiably relying upon class counsel to keep them informed of any progress in the litigation and to advocate for and protect their rights to share in any recovery obtained.

Recent figures, released as part of the 1984 Annual Report of the Director of the Administrative Office of the U.S. Courts, indicate that 988 actions were certified as class actions in 1984 in which numerous class members were represented. Adequate protection of the interests of these and all future absent class members requires that this Court give some direction to practitioners and to the federal courts with respect to the parameters, or at least the minimum requirements, of class counsel's fiduciary duties to absent class members. This case presents the Court with the opportunity to address this important issue, which affects each class action brought in the federal court system.

COURT OF APPEALS EFFORT TO DETERMINE STANDARD

The difficulty experienced by the Court of Appeals in enunciating the appropriate standard by which to test

Class Counsel's performance of its fiduciary duties to Class Members is understandable in view of the virtual absence of any relevant authority in this area, let alone controlling precedent. Zimmer was unable to cite the Court of Appeals to a single reported decision which examined the nature and extent of an attorney's fiduciary duty to his client in the context of a federal class action. Without guidance, the Court of Appeals was required to analogize from similar areas of the law.

The Court of Appeals relied heavily upon the requirements of the due process clause to fix the parameters of Class Counsel's fiduciary duty, and, in doing so, confused the role of the attorney to his client with the role of the district court.[3] The charge of the district court is to assure that all parties receive due process, and class counsel, as an officer of the court, has a duty to assist the court in this effort. However, the advocation and protection of the rights and interests of the parties before the court is within the sole province of the attorney for the parties. The position of class counsel vis-a-vis the members of the plaintiff class and the court was succinctly described in *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 15 (S.D.N.Y. 1980):

> Because members of a ... class have little influence over their lawyer in a class action, *and the judge by necessity puts such a high degree of trust and confidence in him or her*, the plaintiff's counsel in ... class action litigation has special obligations running to both. (Emphasis added.)

In the present case, the issue to be resolved is whether compliance with the notification process ordered by the District Court under Rule 23(e) to comply with due process

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[3] In its opinion, the Court of Appeals stated that, in determining whether Class Counsel breached its fiduciary duty, "considerable weight" should be afforded to the fact that Class Counsel complied with the standards of due process. Appendix at A-9.

requirements was sufficient in itself to satisfy Class Counsel's fiduciary obligations to properly inform their clients, Class Members, of their right to participate in the Settlement Fund.

If the Court of Appeals analysis and rationale of the parameters and extent of Class Counsel's duties to Class Members is correct, there is no difference in these duties. Clearly, such a conclusion is unacceptable, because it substantially erodes, if not eliminates, the high level of responsibility and conduct expected, and traditionally required, of an attorney in dealing with his client, and substitutes a standard which requires only bare compliance with minimum due process. Moreover, the adoption of such a standard is likely to increase the number of potential plaintiffs who elect to opt out of a class in favor of bringing an individual action against the defendant using independent counsel to advocate and protect their interests in the litigation more adequately, thus reducing the effectiveness and utility of the class action as a form of litigation. While Class Counsel has obligations to both the District Court and the absent Class Members, such obligations are not coextensive. If, as Petitioner contends, under the circumstances of this case, more was required than a one-time first-class mailing of notice and a one-time publication to effectively communicate the crucial information contained in the November 10 Notice to Class Members, it was Class Counsel's fiduciary obligation to employ such further procedures as were reasonably necessary to effect this result.

Another factor upon which the District Court is presumed to have relied and which the Court of Appeals accorded "considerable weight" in determining that Class Counsel did not breach its fiduciary duty to Zimmer was that the procedure followed by Class Counsel was customary. Indeed, the Court of Appeals placed great weight on its perception of custom: "Certainly we must be guided by the fact that the practice here alleged to breach

such fiduciary duties is a customary one, and has been approved, after careful judicial scrutiny, not only in this case but in legions of others." Appendix at A-9. The Court of Appeal's reliance on the custom established in this "legion" of cases is misplaced for several reasons. The cases referred to by the Court of Appeals address the narrow issue of the conduct required to satisfy the constitutional requirements of due process or the requirements of Rule 23 of the Federal Rules of Civil Procedure. The gravamen of Zimmer's allegations is not merely that Class Counsel's notification program did not meet the requirements of due process, but that Class Counsel failed to satisfy their *fiduciary duty* to Zimmer, their client, by not taking additional steps to reasonably assure that it received the November 10 Notice. The question of whether a particular procedure is "customary" or sufficient to satisfy the requirements of due process and the Federal Rules of Civil Procedure is irrelevant to the determination of whether Class Counsel satisfactorily performed the duties imposed upon them as fiduciary representatives of their client.

Significantly, several district courts have determined that even the minimum requirements of due process demand more than a single first-class mailing and a one-time publication to apprise class members of the status of a class action. *See, e.g., Appleton Electric Co. v. Advance United Expressways*, 494 F.2d 126 (7th Cir. 1974) (notice of suit by certified mail); *Liddell v. Board of Education of City of St. Louis*, 567 F. Supp. 1037 (E.D. Mo. 1983) (notice of settlement hearing by registered mail and publication); *Commonwealth of Pennsylvania v. Local Union 542*, 555 F. Supp. 1109 (E.D. Pa. 1982) (notice of settlement by certified mail); *Kryiazi v. Western Electric Co.*, 527 F. Supp. 18 (D.N.J. 1981) (notice of settlement by mail combined with follow-up procedure using social security numbers to locate those who had changed address); *Vuyanich v. Republic National Bank of Dallas*, 521 F. Supp. 656 (N.D. Tx. 1981) (notice of settlement by certified mail and publication);

Payton v. Abbott Labs, 83 F.R.D. 382 (D. Ma. 1979) (notice of class certification by first-class mail, return receipt requested); *Entin v. Barg*, 412 F.Supp. 508 (E.D. Pa. 1976) (notice of suit by first-class mail and publication, coupled with telephonic follow-up for those not responding).[4] Unlike the District Court, these courts, by ordering more comprehensive notice procedures, have tacitly recognized that the custom of using first-class mail and publication to communicate with members of a class in all circumstances is, even from a constitutional perspective, questionable at best.[5]

As evidence of the appropriate custom to be followed by Class Counsel in this case, the Court of Appeals looked to those cases which have interpreted the phrase "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort" in Rule 23(c)(2) of the Federal Rules of Civil Procedure. There is a critical distinction, however,

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[4] *Entin* is particularly significant here because Respondent David Berger served as counsel for the plaintiff class in that case and carried out the follow-up procedures ordered by the Court. *Entin*, 412 F. Supp. at 509. In a footnote to the majority opinion, the Court of Appeals questioned "the propriety of applying a malpractice penalty after the fact where counsel did everything they were then expected to do." Appendix at A-9 n.7. In light of class counsel's experience in the *Entin* case, which dealt with notice to persons not yet entitled to the benefit of the fiduciary relationship between attorney and client, Zimmer, as a client of Class Counsel, was entitled to expect a more vigorous effort to notify it of the settlement which would forever bar its right to recover from the defendant in the Antitrust Litigation.

[5] Even the majority of the Court of Appeals admitted that they might have ordered further notice steps had they been sitting as a district court and admonished district courts and class counsel to consider the advisability of further procedures in similar situations in the future. Appendix at A-12 and A-13 n.8. It is difficult to understand how the Court of Appeals could hold that there was no genuine issue of material fact as to the sufficiency of the notice procedures employed if, in their opinion, more extensive efforts might have been necessary just to meet the minimal standards of due process.

between the circumstances considered in this line of authority and the present situation which makes such authorities inappropriate in determining the extent of Class Counsel's fiduciary duty. The notice required by Rule 23(c)(2) is addressed to potential members of a plaintiff class to advise them of the class certification and present them with an opportunity to exclude themselves from the class and from representation in the matter by class counsel. The communication of this notice is the responsibility of the district court. No attorney-client relationship arises between class counsel and the recipients of this notice unless and until the time for opting out of the class has passed and the particular recipient has failed to do so. Conversely, in communicating a notice of settlement to absent class members under Rule 23(e), the class attorney is communicating with the very persons he or she is charged with representing in the particular action (*i.e.*, his or her clients) and it is part of the fiduciary obligation of the class attorney to assure that the client receives the information.

Finally, it should be noted that, in other contexts, courts have determined that adherence to certain customary standards of conduct does not relieve a person from the performance of a legal duty. *See Texas & P. R. Co. v. Behymer*, 189 U.S. 468 (1903); *The T. J. Hooper*, 60 F.2d 737 (2d Cir. 1932); *Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981 (1974). The import of these cases is that the custom itself must be subjected to judicial scrutiny to determine whether the actor's duty has been discharged; not used, as it was by the Court of Appeals in this case, as evidence that Class Counsel's obligations had been fulfilled.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1368

ZIMMER PAPER PRODUCTS INCORPORATED,

Appellant

v.

BERGER & MONTAGUE, P.C.; David Berger; GROSS & SKLAR ASSOCIATES; Warren Rubin; RAWLE & HERDERSON; Avram G. Adler; Marvin I. Barish; Arnold Levin; Howard J. Creskoff; KOHN, SAVETT, MARION & GRAF, P.C.; Harold Kohn; FINE, KAPLAN & BLACK, GENERAL PACKAGING PRODUCTS, INC., formerly COMMERCIAL CARD & PAPER COMPANY, INC.; ANCHOR PAPER CO.; and THE AJAX PAPER TUBE COMPANY

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(C.A. No. 83-2194)

Argued January 15, 1985

Before: ADAMS and WEIS, Circuit Judges,
and HARRIS, District Judge*
(Filed March 22, 1985)

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* Hon. Oren Harris, United States District Court for the Eastern and Western Districts of Arkansas, sitting by designation.

OPINION OF THE COURT

ADAMS, Circuit Judge

The proper elements of notice to class members are a concern in almost every class action; consequently, the interrelated notice requirements of due process and Fed. R. Civ. P. Rule 23 have been frequently litigated. This case, however, raises the question of the adequacy of class notice in a novel context. Zimmer Paper Products, Incorporated, a member of the plaintiff class in an antitrust action, has sued its own class counsel for a breach of fiduciary duty and negligence in failing to provide to it sufficient notice of the settlement of the action. Zimmer asserts that because it never received notice of the settlement, it failed to file a claim for its share, thereby losing approximately $250,000. In seeking to recover this amount, plus interest and attorney's fees, it advances two contentions: (1) that class counsel breached its fiduciary duty by not suggesting or undertaking more thorough notice procedures than the court ordered; and (2) that class counsel negligently carried out the notice procedure that was ordered.

Attorneys for the class provided notice of the settlement and of the necessity to file a claim in a traditional court-approved manner; by both first-class mail and publication in the Wall Street Journal. The district court in this action determined that compliance with these approved notice procedures did not constitute a breach of fiduciary duty and further concluded that plaintiff had made no showing of negligence in class counsel's execution of the notice. Accordingly, the district court granted defendants summary judgment. Because we agree that no negligence was shown, and because we are reluctant to find a breach of fiduciary duty on the basis of a violation of notice requirements that would effectively be imposed retroactively, we will affirm the judgment of the district court.

I.

Defendants were class counsel in an antitrust class action. *Glassine and Greaseproof Paper Antitrust Litigation.* Plaintiff, Zimmer Paper Products, was one of more than 1500 plaintiff class members in the litigation. When the lawsuit was settled, Zimmer did not file a claim for its share of the settlement proceeds. It alleges that it failed to assert such a claim because class counsel did not provide adequate notice.

Two separate notices were sent to class members in the course of the antritrust litigation, one in June and the other in November of 1981. Both notices were carried out in the same court-approved manner. On April 10, 1981, after proposed settlements had been reached with three defendants, the court ordered that "Notice of Class Action and Proposed Partial Settlement" be mailed to all plaintiff class members by June 1, 1981, and be published in all regional editions of *The Wall Street Journal.*[1] Zimmer admits to receiving six copies of the June 1 notice.

The second notice, mailed November 10, 1981, and also published in *The Wall Street Journal*, informed class members of proposed additional settlements and, most importantly, of a plan for distribution of the settlement fund. Zimmer asserts that it did not receive any of the November 10 notices mailed to it, and although it did receive the Wall Street Journal, the notice that was contained in it apparently did not come to its attention.

Both sets of notices were approved by the court, and were carried out in the same manner—by individual first-class mail and publication. Class counsel retained experienced, professional firms to prepare and mail the notices, as is customarily done. A list of potential class members was supplied to Provcor Services, Inc., a company that

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[1] The June 1 notice was to inform class members of the institution of the antitrust litigation, the partial settlements, their membership in the class, and the procedures to follow if they wished to opt out.

regularly engages in class action notice preparation. The list included Zimmer. Provcor placed the class members' names and addresses, and the deviations therefrom,[2] on a computer list. Its list also included Zimmer.

Provcor then verified the accuracy of the list, and printed gum-backed mailing labels. VPI Reproduction Center, Inc., and its subcontractor, Fischler's Printing & Office Products, printed the notices and prepared them for mailing. VPI, Fischler, and Provcor worked together, through Bartholomew Milano, a VPI employee, to ensure that the notices were properly printed, folded, addressed, and mailed. VPI made photocopies of the mailing labels. The photocopies show that seven labels were addressed to Zimmer for each mailing. Provcor then mailed the notices by first-class mail.[3]

Zimmer admits to receiving six of the seven June 1, 1981, notices, which were mailed according to the above-described procedure. When this same procedure was followed on November 10, 1981, Zimmer insists that it received none of the seven notices. Since other plaintiff class members responded by filing claims, it is apparent that at the very least many of the notices were received. Indeed, defendants point out that both Zenith Specialty Bag Co. (whose mailing label appeared on the page preceding Zimmer's), and Zorn Packaging, Inc. (whose mailing label was on the same page as Zimmer's) received the November 10 notice and filed claims.

On August 20, 1982, after the district court had approved the claims filed by class members, the settlement fund was

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[2] The purpose of multiple mailings to class members was to guard against address errors. Thus, for example, Zimmer was listed seven times; four variations were addressed to its Indianapolis office, and three more to its South San Francisco office.

[3] Although there were only 1550 class members, 2,928 address labels were generated, because of the procedure described in note 2 *supra*. The postal receipt indicates that 3,000 were mailed. The discrepancy between 3,000 and 2,928 appears to be attributable to the Post Office's weighing procedure.

fully distributed, on a pro rata basis. Approximately nine months later, in May, 1983, Zimmer filed this action, charging defendants with a breach of their fiduciary duties and with negligence in failing to assure that Zimmer was notified. Zimmer argued before the district court that the notice should have been conducted by certified mail, return receipt requested, rather than first-class mail; that class counsel had a duty to conduct some follow-up procedures upon learning of the 12% response rate to their November 10 notice; that class counsel should have created a reserve contingency fund for late claims; and that class counsel negligently carried out the mailing.

Defendants moved for summary judgment, and on August 2, 1983, the district court granted partial summary judgment. The court held that the defendants had no duty to send notices by certified or registered mail, to employ follow-up procedures, or to establish a reserve contingency fund for late claims.[4] It further held that "first class mailing is sufficient to satisfy the notice requirements of Federal Rule of Civil Procedure 23(a); moreover, first class mailing comported with the court's order as to the mode of notice to be utilized." App. at 372.

The district court did not dismiss the entire case at that time, but allowed plaintiff to go forward in order to determine through discovery whether the mailing procedure itself was negligently administered. After extensive discovery, the district court awarded defendants summary judgment on the remaining issue, concluding that Zimmer had produced no evidence that would support a finding of negligence. This appeal followed.

II.

Zimmer advances two principal contentions on appeal. First, it contends that, given the particular circumstances

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[4] Zimmer did not raise the contingency fund argument on appeal.

of this case, class counsel breached its fiduciary duty in suggesting and conducting a court-approved notice procedure that utilized only first-class mail and publication. Second, it maintains that even if the court-ordered notice is legally sufficient to meet counsel's fiduciary obligations, there are material issues of fact regarding negligence in the execution of the notice procedure that preclude summary judgment. We address these arguments in order.

A.

It is well settled that in the usual situation first-class mail and publication fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974); *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 962-64 (3d Cir. 1983); *Cayuga Indian National v. Carey*, 89 F.R.D. 627, 632-33 (N.D.N.Y. 1981). Rule 23, which effectively incorporated the due process standards suggested by the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 318 (1950), establishes varying notice requirements, depending on the nature of the class action and the content of the notice. *See* Fed. R. Civ. P. 23 Advisory Committee Notes to 1966 Amendment ("mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process"). This rule is in keeping with *Mullane's* directive that notice "must be such as is reasonably calculated to reach interested parties" and "apprise [them] of the pendency of the action." *Mullane*, 339 U.S. at 314, 318. Rule 23(d)(2) governs most notices during the pendency of a class action and confides the manner of notice to the district court's discretion, subject to due process requirements. Rule 23(e), which also commits the form of the notice to the court's discretion, mandates notice of a settlement and of a claimant's entitlement to share in it,

such as the November 10 notice at issue here. A higher notice standard is established by Rule 23(c)(2). That rule, however, applies only to notice of class certification in (b)(3) class actions, advising potential class members of their right to exclude themselves from the class. Rule 23(c)(2) mandates "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[5]

First-class mail and publication have consistently been considered sufficient to satisfy the notice requirements of Rule 23(d)(2) and Rule 23(e) for advising class members of a proposed settlement and of their right to file claims. *E.g.*, *Walsh*, 726 F.2d at 962-64 (pre- and post-settlement notice by first-class mail and publication "clearly adequate" under Rule 23(d)(2) and 23(e)); *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1125-27 and n.5 (9th Cir. 1977) ("fair and reasonable," under 23(d)(2), to proceed by mailing claim notices to last addresses of potential class members and by publication); *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 548 (N.D. Ill. 1982) (notice of settlement by first-class mail and publication "fair and adequate" under 23(e)); *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 65 (N.D. Cal. 1976) (notice of proposed settlement and right to file a claim for a portion of settlement sent by first-class mail).

Indeed, first-class mail and publication regularly have been deemed adequate under the stricter notice requirements, not applicable here, of Rule 23(c)(2). *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 173-75; *Steiner v. Equimark Corp.*, 96 F.R.D. 603, 614 (W.D. Pa. 1983)

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[5] The November 10 notice need not meet the more stringent standards of Rule 23(c)(2), because that rule applies only to an opt-out notice at the time of (b)(3) class certification. *See In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1126-27 (9th Cir. 1977). The June 10 notice, however, which was effected in the same manner as this notice, did fall under 23(c)(2), and presumably the district court applied the stricter standard in approving the form of that notice. The procedure for the June 10 notice has not been challenged.

(individual first-class mail is "best notice practicable" under 23(c)(2)); *Trist v. First Federal Savings & Loan Association*, 89 F.R.D. 1, 2 (E.D. Pa. 1980) (individual mail to last known address meets 23(c)(2) standard); *Piel v. National Semiconductor Corp.*, 86 F.R.D. 357, 375 (E.D. Pa. 1980) (first-class mail); *Oneida Indian Nation v. New York*, 85 F.R.D. 701, 709 (N.D.N.Y. 1980) (first-class mail and publication in *New York Times*).

The two leading Supreme Court cases on notice, *Mullane* and *Eisen*, both prescribed first-class mail to identifiable individuals together with publication. *Eisen*, 417 U.S. at 176; *Mullane*, 339 U.S. at 318. While the Supreme Court may not have intended this particular procedure to be taken as a hard and fast rule,[6] it has nevertheless become common practice to send notice by first-class mail and publication. Our Court favors "maximum notice" in class action contexts, but the cases establishing that policy themselves required only first-class mail and publication. *See Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975); *Greenfield v. Village Industries, Inc.*, 483 F.2d 824 (3rd Cir. 1973).

Seeking to avoid the import of these cases, Zimmer argues that regardless of compliance with due process, Rule 23, a court order, and the general practice of class action notice, class counsel is personally liable for a breach of its fiduciary duty in not doing something more. This Court's discussion of notice in *Greenfield v. Village Industries, Inc., supra*, at 832 however, suggests that the bounds of a class counsel's fiduciary duty with respect to notice are determined in large part by due process and Rule 23 requirements. In a paragraph explicitly devoted to "not the least important of the fiduciary duties shared by

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[6] The Supreme Court's analysis in *Mullane* suggests that district courts should proceed on a case-by-case basis, not applying a flat rule, but exercising their discretion as the circumstances warrant. *Mullane*, 339 U.S. at 314. In the specific situation where Rule 23(c)(2) applies, a court's discretion is more limited. *Eisen*, 417 U.S. at 175-77, but nothing in Rule 23 prohibits courts from requiring more than the Rule provides.

counsel and the court," we quoted liberally from both *Mullane* and Rule 23, *id.* Consequently, in determining whether an attorney for a class has breached a fiduciary duty, we should afford considerable weight to the fact that he or she has done all that is generally done, all that due process requires, and all that the court ordered.

Zimmer suggests that class counsel's fiduciary duty encompassed a responsibility to effect notice by certified mail, return receipt requested, and to undertake follow-up procedures after the first notice was sent. It cites no case to support this proposition. Indeed, the only decision we have found that even discusses the relative merits of first-class and certified mail in the notice context expressly reaffirms the adequacy of first-class mail. *See Cayuga Indian Nation v. Carey*, 89 F.R.D. at 632-33. The bounds of fiduciary duty are undoubtedly not easy to define,[7] but certainly we must be guided by the fact that the practice here alleged to breach such duties is a customary one, and has been approved, after careful judicial scrutiny, not only in this case but in legions of others. If class counsel in this case have breached their fiduciary duties, attorneys throughout the country who have complied with court orders and a Supreme Court-approved notice procedure may well be subject to malpractice lawsuits by anyone who alleges that he or she did not receive notice of the opportunity to file a claim.

These untoward nationwide results need not follow, Zimmer argues, because of the peculiar nature of this case. Specifically, Zimmer points to the large amount of the settlement (over twenty million dollars), the relatively

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[7] If the line is difficult for the courts to trace after the fact, it is even more difficult for counsel to draw in the course of a proceeding. This may not excuse any breach of fiduciary duty, but it does raise serious questions about the propriety of applying a malpractice penalty after the fact where counsel did everything they were then expected to do. *Cf.* Supermarkets General Corp. v. Grinnell Corp., 490 F.2d 1183, 1186 (2d Cir. 1974) ("we are loath to impose a [notice] requirement retroactively").

small number of class members (approximately 1550), and what it characterizes as an uncommonly low response rate to the November notices (approximately 12% of the class filed claims to share in the settlement). While each of these factors might be relevant factors at the time the notice procedure is being considered and implemented in the first instance, we do not believe that they support Zimmer's assertion of malpractice after the notices have been sent out.

First, Zimmer has not offered sufficient evidence to make these figures particularly meaningful. It notes, for example, that the average claim was approximately $12,000, but fails to provide a mean figure. If there were several large claims involved, as is often the situation in such actions, the mean figure might well be considerably lower. The record here shows that several settlement shares in the antitrust litigation were in excess of $1.5 million, while other claims were as low as $21.28. App. at 56-73. It is certainly reasonable to assume that most of those who did not respond might have been concentrated in the lower rather than the higher end of these figures.

Second, the case law does not make clear what role, if any, the amount of money involved should play in ascertaining whether the notice is reasonably calculated to apprise class members of the action. In *Eisen*, where the cost of individual notice to class members was so considerable with respect to the potential recovery as effectively to end the suit as a class action, the Court nonetheless required individual notice, stating "there is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Eisen*, 417 U.S. at 176. Yet, Zimmer suggests that we can tailor the notice requirements of fiduciary duty to the pocketbook of a particular plaintiff—itself. Moreover, the large amount of money involved and the nature of the class in fact might cut against Zimmer's argument. Zimmer is not an unsophisticated consumer, but

a corporation that did considerable business with the defendants named in the antitrust litigation. It received the June 10 notice, and thus was aware that the suit was pending, that half the defendants had already settled, and that Zimmer, which had done a large volume of business with the defendants, probably had a substantial stake in the matter. It would not be unreasonable, in such a situation, for a corporation such as Zimmer to notify its counsel, so that developments in the action might be followed.

These considerations gain significance in light of the fact that the class as a whole consisted primarily of business entities as distinguished from individuals. The presumed expertise of such a class in legal matters suggests that first-class mail would be "reasonably calculated ... to apprise interested parties" of the action. *Mullane*, 339 U.S. at 314. More elaborate steps, such as certified mail, have been used in situations where class members may be presumed to be less aware of a notice's legal ramifications. *See, e.g., Commonwealth of Pennsylvania v. Local Union 542*, 555 F. Supp. 1109, 1110 (E.D. Pa. 1982) (court ordered certified mail for notice to individual class members in employment discrimination case); *Kyriazi v. Western Electric Co.*, 527 F. Supp. 18, 39 (D.N.J. 1981) (same); *Vuyanich v. Republic National Bank of Dallas*, 521 F. Supp. 656 (N.D. Tex. 1981) *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984) (same).

Finally, the 12% response rate does not appear to be determinative. Although at first glance this response rate appears low, there has been considerable debate over whether or not it is in fact low. While the defendants have cited studies by Herbert Newberg, author of a treatise on class actions, to demonstrate that a 12% rate is in line with response rates in similar settlements, Zimmer has come forward with nothing to suggest that the rate is uncharacteristically low. *See* H. Newberg, *Newberg on Class Actions* §2695, Feb. 1984 Current Supp., Table I at

CS7-57 to CS7-62. Since it is the plaintiff's burden to establish that a fiduciary duty has been breached, we believe this lack of evidence to be damaging to Zimmer's reliance on the 12% rate. *Cf. Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 480 (3rd Cir. 1979) (plaintiff in malpractice case must establish a standard of care in profession in order to show a breach).

Thus, while Zimmer's figures convey a superficially appealing argument, they do not stand up under inspection. Before approving any distribution of settlement proceeds to class members, the district court undoubtedly considered such factors. If it were dissatisfied it unquestionably would have ordered further notice procedures. In the future, district courts should carefully review the specific characteristics of a class action to determine whether more thorough notice procedures are justified by the circumstances. We do not believe, however, that the district court in this antitrust litigation abused its discretion in approving notice by first-class mail and publication. Once a court, whose discretionary order is presumptively valid, has properly sanctioned such a notice procedure, moreover, a complaining party faces a standard at least as high as abuse of discretion in seeking to show malpractice by counsel who followed the court's order. There is no basis in the record for saying that the circumstances here support any such conclusion.

We do not hold today that first-class mail and publication will always suffice, either under a due process or a fiduciary duty analysis. Indeed, given the large sums involved and the low response rate, it might have been preferable for the district court in the antitrust litigation to have required certified mail or follow-up procedures.[8] We

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[8] Were we sitting as a district court making the initial decisions to provide notice and to distribute the settlement, we might well have exercised our discretion to order further notice steps. However, we do not find ourselves in that posture, but rather we act here as a

(Footnote continued on following page)

hold only that in this case, where the procedure employed was customary and court-approved, where there was no suggestion before the district court that a different type of notice be employed, and where the plaintiffs have offered little support for the proposition that more was required, class counsel cannot be said to have breached their duties. Like the Second Circuit, we are loath to apply new notice requirements retroactively. *Supermarkets General Corp.*, 490 F.2d at 1186.

B.

Zimmer also insists that the district court erred in granting summary judgment on its negligence claim. It urges that even if the notice procedure employed does not itself constitute a breach of fiduciary duty, class counsel is liable if it conducted the notice procedure in a negligent manner. The district court concurred in principle with this contention, and therefore allowed Zimmer to conduct substantial discovery to determine whether in fact class counsel had been negligent in preparing and mailing the notifications. Because Zimmer was unable to show any evidence of negligence causing Zimmer to fail to receive notice, the district court awarded defendants summary judgment. App. at 377-86. We agree that Zimmer's extensive discovery has failed to develop any material issue of fact regarding class counsel's negligence.

In order to establish negligence, Zimmer bears the burden of proving three elements: (1) a duty or standard of care; (2) a breach of that duty; and (3) causation. W. Prosser, *Handbook on the Law of Torts* §30, at 13 (4th ed.

(Footnote continued from preceeding page)

reviewing court. If we imposed such procedures now, we would be creating retroactive requirements. Whether this case is characterized as a malpractice action or a breach of fiduciary duty action, we cannot disregard the fact that class counsel did all that they were ordered and expected to do. In the future, however, the district courts and class counsel might well consider whether in similar situations further procedures would be advisable.

1971). The district court's grant of summary judgment to defendants must be affirmed if the evidence of negligence is too speculative to establish any material issue of fact. *See In re Japanese Electronics Products Antitrust Litigation*, 723 F.2d 238, 313 (3d Cir. 1983); *Neely v. St. Paul Fire & Marine Insurance Co.*, 584 F.2d 341, 346 (9th Cir. 1978).

Zimmer has not adduced any evidence to suggest that class counsel's hiring of three professional firms to print, prepare and mail the notice was itself below the legal profession's standard of care with regard to class notice. We must view the evidence Zimmer has presented in light of the absence of a proffer of any standard of care in the legal profession. Zimmer primarily relies on "numerous information gaps" in the deposition testimony of the employees who conducted the mailing, as well as a lack of verification procedures. Both categories of evidence suggest, at best, errors of omission rather than commission, and thus highlight Zimmer's lack of proof regarding counsel's relevant duty. Unless a duty to verify is established, the absence of certain verification steps that Zimmer would have preferred to have seen performed is not too meaningful. In fact, it is undisputed that some verification procedures were follows: a photocopy of the mailing labels was prepared, and the mailing label sheet was checked first for accuracy and later to ascertain whether all mailing labels were peeled off and affixed to envelopes.

Moreover, the probative value of "information gaps" in testimony about a specific mailing that occurred nearly two years before depositions were taken is limited. The fact that an employee is unable to remember specifically who affixed the labels to the notice does not affirmatively establish, or even suggest negligence. This is particularly so where there is evidence that many class members, including companies on the same label page as Zimmer and on the preceding page, received the notice and filed claims.

III.

For the foregoing reasons, and for the reasons stated by the district court, we will affirm the district court's order for summary judgment against plaintiff Zimmer.

WEIS, *Circuit Judge*, dissenting.

For present purposes, I am willing to accept the majority's position that class counsel followed customary procedures in proposing a first class mailing of the November notice. However, I do not agree that as a matter of law the defendants' fiduciary duties required no further action in the face of any obviously low reply rate. When the initial effort to provide notice elicited a response from only 12% of the class, counsel may have owed their clients the obligation to do more.

The November notice stated that approximately 20 million dollars less counsel fees of about 4 million dollars would be available for distribution. Despite the likelihood that filing a proof of claim would lead to a share of the fund, only 187 of a class of approximately 1550 business enterprises responded, 12% of those who had been identified as being eligible for payment in some amount. Counsel made no further effort to contact the absentee members of the class, but simply applied for court approval to distribute the fund pro rata to those who had filed claims.

It was not until after distribution of the fund that plaintiff first learned of the final settlement[1] and the requirement of filing a proof of claim. One of its officers contacted defendants about participating in the fund, but class counsel rejected the claim as untimely, and plaintiff filed this suit.

The district court dismissed the complaint in a series of orders. In rejecting the plaintiff's contention that defendants should have taken additional steps to notify

[1] Although defendants are openly skeptical of the plaintiff's assertion that it did not receive notice, in the current posture of the litigation, the allegation must be accepted as true.

members of the class, the court stated there was "no such duty." The district judge had no doubt that the mailing comported with the notice requirements of Fed. R. Civ. P. 23(e), as well as the court's order directing the use of first class mail.

The court cited no authority for its conclusion that counsel did not have a duty to follow-up. Having determined that there had been compliance with the notice requirements of Fed. R. Civ. P. 23(e) and the mailing order, the court apparently concluded that the fiduciary obligation counsel owed to the absentee members of the class had been fulfilled as well.

The inquiry into counsels' duty toward their clients should not have ended at that point. The fiduciary obligation of class counsel may go beyond the notice requirements of Rule 23(e). If the notice procedure is ineffective then there should be an exploration of the availability and feasibility of other steps together with a determination of whether it is reasonable to require counsel to implement them.

To illustrate the point, as an extreme example, one can hypothesize a situation in which none of the absentee class members responds to a settlement notice. In that situation, where adequate funds are available for distribution and reimbursement of expenses, surely counsel is not free to disburse the entire fund to the class representatives and then collect the legal fees without further efforts to contact the absentees. Obviously, the point at which the response level gives reasonable assurance of adequate notice must depend on the circumstances.

It is important to recognize the procedural posture of the case at hand. Insofar as the "follow through" count was concerned, the district court was confronted with what was essentially a motion to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). The affidavits which defendants filed to support their motion for summary judgment were directed to other issues and other counts.

In response to the defendants' motion, plaintiff contended that counsel owed a fiduciary duty to their client, a class member, to exercise reasonable care to see that it received notice of the settlement. Plaintiff argued the inferences to be drawn from the pleaded facts established that counsel did not act reasonably in failing to take additional measures when it was obvious the mailing had not yielded the expected results. According to plaintiff, class counsel could not simply walk away from the scene, having made no other attempt to notify the beneficiaries.

On the other hand, defendants characterized the case as one sounding in malpractice. They cited *Lentino v. Fringe Benefit Employee Plans, Inc.*, 611 F.2d 474 (3d Cir. 1979), as holding that expert testimony is required to establish the appropriate standard and whether defendants complied with it. In the absence of expert evidence, defendants contended that the plaintiff's case could not survive summary judgment. They also argued that on the basis of statistics culled from NEWBERG ON CLASS ACTIONS §2695, February 1984, Current Supp., Table I at CS7-57 to CS7-62, that a 12% return rate was consistent with that in similar settlements.[2]

Lentino, however, is a case which sets out the requirements for proof at trial. It is not applicable when, as here, defendants move to dismiss the complaint for failure to state a claim. Having chosen that course, they must assume that the allegations in the complaint are true. Plaintiff need not prove its facts in response to the motion nor must it present testimony, expert or otherwise.

The complaint sets out some of the pertinent facts and charges that defendants were guilty of a breach of their

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[2] If defendants are correct in this assertion, then they have raised a very serious question about the legitimacy of class action damage suits under Rule 23(b)(3). If, on the average only 12% of those who have sustained damages are interested in recovery, one may question the propriety of submitting claims on behalf of a class for verdicts or settlements based on 100% of the losses.

duty to exercise reasonable care. If the court found that the plaintiff's allegations were inadequate, then an opportunity to amend should have been provided.

If the defendants' aim was to force plaintiff to present an expert's affidavit or sworn testimony, then the burden initially was on them to file their own expert's affidavit as part of their motion for summary judgment. Plaintiff would then be required to respond in appropriate fashion, either controverting the defendants' material or establishing its inapplicability.

If the motion here is construed as one for summary judgment, it fails to meet the requirements of Fed. R. Civ. P. 56. Defendants references to statistics in the NEWBERG commentary are neither sworn testimony nor affidavits. They are not facts which can support summary judgment nor do they require a response under oath. It follows, therefore, that on this record regardless of whether defendants' submission is characterized as a motion to dismiss or for summary judgment, the district judge erred in granting it.

In considering a motion for summary judgment, a court must recognize that where there is a disagreement about proper inferences to be drawn from the facts, a trial is required to resolve the conflicting versions of the parties. *Peterson v. Lehigh Valley District Council*, 676 F.2d 81 (3d Cir. 1982). Any reasonable inferences from the facts must be resolved in favor of the party against whom judgment is entered. *Betts Laboratories, Inc. v. Hines*, 647 F.2d 402, 404 (3d Cir. 1981).

As we noted in *Lentino*, the standard of care is a "question of fact that is best left to the presentation of evidence with the opportunity for cross-examination and rebuttal." *Id.* at 481. Plaintiff should have been given the opportunity to prove at trial that class counsel breached their fiduciary duty in failing to follow up.

Moreover, I do not find the commentary excerpts on which defendants relied to be persuasive in the circumstances here. As Herbert B. Newberg candidly writes, "There are few reported opinions that furnish any detailed information about proof of claim response rates, so that any statistics must generally be gleaned from unreported documents filed of record or unreported opinions. ... [T]he claim response level will tend to vary with the circumstances, types of class notices employed, and size of individual claims involved in each case." NEWBERG ON CLASS ACTIONS § 2695.

This court has had occasion to comment on the pertinent factors bearing on notice response in *Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 395 (3d Cir. 1981). There we said, "Passivity among absent members is less likely to be a problem where liability is already established, the time of actual recovery is less remote, and the incentive for participation thus enhanced." Those factors are all present in the case at hand.

The appropriate standards for evaluating class counsels' duties to provide notice has seldom been discussed in case law. However, in *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973), we said

> "...in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court. ...Not the least important of the fiduciary duties shared by counsel and the court is their duty to ensure that absentee class members have knowledge of proceedings in which a final judgment may directly affect their interest."

Although not often subject to judicial review, circumstance similar to those presented here are not completely unknown to decisional law. In *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), the Supreme Court noted the difficulties of notifying absentee class members in a case

where the settlement amount and attorneys fees were substantially less, and the number of absentee class members greater, than in the case at hand. In *Boeing*, the Court observed that a master undertook extensive efforts to locate absentee class members, including the employment of a professional search firm.

In *Entin v. Barg*, 412 F. Supp. 508 (E.D. Pa. 1976), the court discussed the engagement of a finding service to develop current addresses for potential class members whose initial notices were returned by the postal service as undeliverable. *See also Duban v. Diversified Mortgage Investors*, 87 F.R.D. 33, 43 (S.D.N.Y. 1980). In addition to these references in case law, the follow-up activities of corporations soliciting proxies after an initial first class mailing are matters of common knowledge.

Depriving plaintiff of the opportunity to participate in the distribution is particularly unfortunate here because Zimmer's losses contributed to increasing the amount of the settlement achieved. In arriving at a suitable settlement, counsel no doubt accumulated the losses suffered by each member of the class as a beginning point and then applied the various factors which go into the determination of a fair and reasonable compromise of that total figure.

The settlement amount, therefore, took into account damages sustained by plaintiff, but, in distribution, its share was given pro rata to other members of the class. Those parties received not only the amount due them but the plaintiff's portion as well. To that extent, the recipients were overcompensated and plaintiff short changed. *Cf. Beecher v. Able*, 575 F.2d 1010 (2d Cir. 1978).

Similarly, the fees which class counsel received were determined by a process in which the size of the settlement was a factor. In this respect, the losses sustained by plaintiff played a part in augmenting counsels' fee. Viewed in this light, it is apparent that counsel were not only fiduciaries, but well compensated ones as well.

In view of these considerations and given the limited response to the November 1981 mailing, I believe that plaintiff has presented sufficient facts to question the reasonableness of the defendants' failure to take follow-up action.

As the majority indicates, there are other matters bearing on ultimate liability, such as the possible duty of plaintiff itself to have followed up on the litigation. But that is a matter of defense not at issue here. Other factors as well might have had some effect on the outcome. For example, the relatively modest time and expenditure which would have been required to provide for another first class or certified mailing to those who did not respond to the initial notice would be a consideration. In view of the large settlement fund and money available for expenses, measures considered unreasonable in other circumstances may have been required here. These and other concerns were for a jury to weigh.

I would vacate the entry of summary judgment and remand for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of
Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZIMMER PAPER PRODUCTS INCORPORATED	)	CIVIL ACTION
v.	)	ENTERED MAY 31, 1984
BERGER & MONTAGUE, P.C., et al.	)	NO. 83-2194

MEMORANDUM

POLLAK, J. MAY 30, 1984

Plaintiff in this case, Zimmer Paper Products, Inc. ("Zimmer"), belonged to the plaintiff class in *Glassine and Greaseproof Paper Antitrust Litigation*, Master File No. 80-914, M.D.L. No. 475. The antitrust litigation settled. Zimmer claims that it never received a notice dated November 10, 1981, which announced the settlement of the antitrust litigation and explained the procedure for filing a claim on the settlement fund. Zimmer never filed such a claim and consequently Zimmer did not participate in the class' recovery.

Zimmer commenced this action against the antitrust litigation class' counsel and the antitrust litigation representative plaintiffs. Zimmer sought to recover the amount that it would have recovered from the settlement fund on a variety of theories. Zimmer contended that the class representatives and their attorneys bore responsibility for Zimmer's alleged failure to receive the November 10, 1981, notice and Zimmer's alleged consequent failure to file a claim.

By Order dated August 2, 1983, I dismissed all claims against the class representatives "because there is no viable theory supporting imposition of civil liability on the named class representatives...." Order ¶ 2 (Aug. 2, 1983). I also dismissed all claims against the attorney defendants other

than a claim that the attorney defendants "negligently failed to carry out the proper procedures in mailing the notice first class." *Id.* ¶ 4. I held that "[f]irst class mailing is sufficient to satisfy the notice requirement of Federal Rule of Civil Procedure 23(e)...." *Id.* ¶ 3.

On August 3, 1983, plaintiff filed "Count II," essentially an amendment to its complaint. Count II asserted a claim against the attorney defendants for failure to mail the November 10, 1981, notice with or without negligence. Relying on *Trist v. First Federal Savings & Loan*, 89 F.R.D. 1 (E.D. Pa. 1980), I dismissed Count II. I again held that "[p]laintiff may only recover if it demonstrates that defendants negligently failed to mail notice to plaintiff." Order at 3 (October 6, 1983).

Discovery proceeded in this matter through the autumn and winter of 1983. In December, defendants moved for summary judgment for three reasons. First, defendants asserted that plaintiff had adduced no evidence of defendants' negligence while defendants had adduced evidence of their own due care. Second, defendants claimed that plaintiff had adduced no evidence that any negligence of defendants' caused plaintiff to fail to file a notice of claim while defendants had adduced evidence suggesting that no causation existed. Third, defendants contended that publication of notice of the settlement in the *Wall Street Journal* insulated them from liability.

On May 27, 1984, I ruled that the last of these three grounds for summary judgment was legally insufficient:

> Notice by publication suffices for class members whose notice "falls through the figurative crack...." *Trist v. First Federal Savings & Loan*, 89 F.R.D. 1, 3 (E.D. Pa. 1980) (perfect mailing not required to bind class members). However, notice by publication does not insulate the class' attorney from liability for negligent mailing. To hold that publication sufficed in the face of negligent mailing would be to deny the teaching of *Mullane v. Central Hanover Bank & Trust*,

> 339 U.S. 306 (1970), that notification of class members must comport with due process protections. The Supreme Court has specifically held that due process requires mailing, and not mere publication, when the notifier knows the address of the person entitled to notice. *Mennonite Board of Mission v. Adams*, 103 S.Ct. 2706 (1983). Due process may not exact a guarantee that the mailing process be perfect, but it does not tolerate a negligent mailing process. For this reason, the fact of proper publication in the *Wall Street Journal* of itself does not entitle defendants to summary judgment.

Memorandum/Order at 2-3 (March 27, 1984); *see also Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 962-964 (3d Cir. 1983). As to negligence and causation, however, I held on March 27, that plaintiff had not properly responded to defendants' motions under Rule 56(e). I therefore granted plaintiff additional time to present evidence that indicated the existence of a material issue of fact concerning defendants' negligence and the existence of a causal relationship between that asserted negligence and Zimmer's failure to file a claim in the antitrust litigation.

The parties do not dispute that defendants delegated the tasks involved in printing and mailing the November 10, 1981, notice. Provcor Services, Inc. ("Provcor") performed some functions as did VPI Reproduction Center, Inc. ("VPI"). VPI in turn subcontracted most of its responsibilities to Fischler's Printing & Office Products ("Fischler"). Zimmer has not adduced any evidence, nor does it contend, that any of these entities was an inappropriate choice for the preparation of notices and mailing labels or for the task of mailing the notices.

The parties do not dispute that Provcor prepared a set of gum-backed mailing labels which Provcor turned over to VPI. The parties do not dispute that VPI made accurate copies of these mailing labels which VPI gave to defendants who in turn filed the copies with the court. One such accurate copy shows four labels addressed to Zimmer's

Indianapolis office and three addressed to Zimmer's South San Francisco office. Goff Affidavit, exh. K, labels 3709-3716.

The parties do not dispute that a large number of notices were mailed by Provcor. 2928 should have been mailed, but the Postal Service receipted for 3000. In any event, the parties do not dispute that most of the notices intended to be sent were in fact mailed.

The parties do not dispute that at least some labels in the near proximity of the Zimmer labels were affixed to notices and properly mailed. Zenith Specialty Bag Co. (label 3702) and Zorn Packaging Inc. (label 3723) filed claims in the antitrust litigation on the basis of the notices received by them.

In order to survive this motion for summary judgment, Zimmer must present some evidence of negligence which caused Zimmer to fail to receive notice of the anti-trust litigation settlement. As the foregoing undisputed facts indicate, any negligence not occurring during the process of affixing address labels or mailing the addressed notices cannot have caused Zimmer's asserted failure to receive the notice. For example, had Provcor negligently omitted certain names from the label list, this omission could not have caused Zimmer's injury because Provcor did not omit Zimmer's name.

Defendants have presented evidence which would permit a jury to infer that all of the labels printed by Provcor were affixed to notices. As noted above, many labels, including labels alphabetically near the Zimmer labels, were affixed to notices and mailed. The evidence is not clear as to whether VPI or Fischler affixed the labels. However, Bartholomew J. Milano testified on deposition that it was VPI's practice to be certain that no labels remained on the backers at the end of a job. Milano dep. at 34. Marianne Schwartz testified in a similar fashion on behalf of Fischler. Schwartz dep. at 27-28.

In addition, defendants have presented evidence from which a jury could infer that all 2928 notices were mailed. The Postal Service gave a receipt for 3000 notices. The Postal Service apparently arrived at this figure by weighing the mailing. A jury could conclude that the inaccuracy of the weighing method accounted for the discrepancy between 2928 and 3000.

On the other hand, Zimmer has presented no evidence which indicates that VPI or Fischler negligently failed to affix all 2928 labels or that Provcor negligently failed to mail all 2928 notices. Zimmer has adduced four sorts of evidence. First, Zimmer presents evidence that it never received the November 10 notice. Second, Zimmer presents evidence that none of defendants' agents checked the labelled notices to ensure that all labels had been affixed. Third, Zimmer presents evidence that none of defendants' agents ensured proper mailing by requiring return receipts or telephone confirmations. Fourth, Zimmer presents evidence that defendants' agents cannot accurately or completely recall how all of the tasks required for proper mailing were accomplished. Neither separately nor in combination do these pieces of evidence raise a material issue of fact as to both negligence and causation.

Evidence that Zimmer never received the November 10 notice is necessary but not sufficient to make out Zimmer's case. If Zimmer could not assert that it had not received the notice, then Zimmer would have not established that any proven negligence caused Zimmer's injury. However, the fact that Zimmer did not receive the notice does not give rise to an inference that defendants, or their agents, acted negligently.

Evidence that defendants or their agents did not check the addressed labels against a master list does not support a finding of negligence. A jury could not reasonably conclude that merely ascertaining that all labels provided had been

affixed (by checking that none were left on their backers) and that all labelled notices were mailed (by obtaining a receipt for more than the number mailed) did not suffice. The law cannot require an unlimited amount of rechecking. If it did, the costs of notifying class members would defeat the utility of the class action mechanism.

For similar reasons, evidence that defendants, or their agents, failed to use certified mail or telephone confirmations to ensure complete mailing does not support an inference of negligence. First class mailing suffices.

Finally, evidence that defendants cannot now prove their non-negligence does not give rise to an inference of negligence. The burden of coming forward lies with plaintiff in this action and not with defendants. The absence of evidence of due care cannot do service as evidence of the absence of care. In this regard Zimmer contends that the discrepancy between the Postal Service receipt for the notices (listing 3000 items) and the number of address labels (2928) justifies an inference that Provcor mailed fewer than 2928 notices. While a receipt for 3000 notices justifies an inference that 2928 notices were mailed, it does not justify an inference that fewer than 2928 notices were mailed. It certainly does not justify an inference that any failure to mail arose because of defendants' agents' negligence.

For the foregoing reasons, the accompanying Order grants defendants' motions for summary judgment.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZIMMER PAPER PRODUCTS INCORPORATED	)	CIVIL ACTION
v.	)	ENTERED MAY 31, 1984
BERGER & MONTAGUE, P.C., et al.	)	NO. 83-2194

ORDER

For the reasons stated in the accompanying Memorandum, defendants' motions for summary judgment are GRANTED. Judgment shall be entered in favor of defendants Berger & Montague, P.C., David Berger, Gross & Sklar Associates, Warren Rubin, Rawle & Henderson, Arnold Levin, Kohn, Savett, Marion & Graf, P.C., Harold Kohn, and Fine, Kaplan & Black, and against plaintiff Zimmer Paper Products, Inc.

/s/ Louis H. Pollak
POLLAK, J.

MAY 30, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZIMMER PAPER PRODUCTS INCORPORATED	)	CIVIL ACTION
v.	)	ENTERED MARCH 28, 1984
BERGER & MONTAGUE, P.C., et al.	)	NO. 83-2194

MEMORANDUM/ORDER

POLLAK, J. MARCH 27, 1984

This malpractice action involves a claim that attorneys for the plaintiff class in the *Glassine and Greaseproof Paper Antitrust Litigation*, M.D.L. Docket No. 475, negligently mailed notice of a settlement to the class so that Zimmer Paper Products, a member of the antitrust litigation class, never received the notice. Plaintiff Zimmer alleges that it did not become aware of the settlement and that it consequently failed to file a notice of claim, disqualifying it from sharing in the class' recovery. Defendants have now moved for summary judgment.

Defendants assert that they are entitled to a judgment as a matter of law for three reasons. First, defendants assert that plaintiff has adduced no evidence of defendants' negligence while defendants have adduced evidence of their own due care. Second, defendants' claim that plaintiff has adduced no evidence that any negligence of defendants caused plaintiff to fail to file a notice of claim while defendants have adduced evidence suggesting that no causation exists. Third, defendants contend that publication of notice of the settlement in the *Wall Street Journal* insulates defendants from liability. Plaintiff subscribed to the *Wall Street Journal* and the *Journal* mailed the issue in question to plaintiff.

Plaintiff responds to this third contention of defendants by asserting that notice by publication can never suffice when class members' addresses are known. This cannot be true. Notice by publication suffices for class members whose notice "falls through the figurative crack...." *Trist v. First Federal Savings & Loan*, 89 F.R.D. 1, 3 (E.D. Pa. 1980) (perfect mailing not required to bind class members). However, notice by publication does not insulate the class' attorney from liability for negligent mailing. To hold that publication sufficed in the face of negligent mailing would be to deny the teaching of *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950), that notification of class members must comport with due process protections. The Supreme Court has specifically held that due process requires mailing, and not mere publication, when the notifier knows the address of the person entitled to notice. *Mennonite Board of Mission v. Adams*, 103 S. Ct. 2706 (1983). Due process may not exact a guarantee that the mailing process be perfect, but it does not tolerate a negligent mailing process. For this reason, the fact of proper publication in the *Wall Street Journal* of itself does not entitle defendants to summary judgment.

Plaintiff, however, has not properly responded to either of defendants' other two asserted grounds for summary judgment. Rule 56 requires a party responding to a motion for summary judgment supported by depositions or affidavits to present similar evidence and not merely to rest on "allegations or denials of his pleading...." Fed. R. Civ. P. 56(e).

On the causation question plaintiff has presented no evidence establishing a material issue of fact. Plaintiff's entire response is as follows:

> Defendants' assertion that even if negligent, their acts were not the cause of Plaintiff's non-receipt of the November 10 Notice is baseless. Defendants had a duty to take all appropriate steps to inform Zimmer and all class members of critical stages of the

> litigation. Defendants' failure to do so was the direct cause of Plaintiff's non-receipt of the November 10 Notice, and, therefore, of Plaintiff's failure to participate in the sizeable settlement fund which is the basis of this action.

Plaintiff's Brief at 2. Defendants, however, have asserted that due to the absence of several key employees of plaintiff during the relevant week, even if plaintiff had received the November 10 notice, plaintiff would not have acted upon it. Defendants have supported this assertion with pertinent evidence. Plaintiff must similarly submit pertinent evidence to establish a material issue of fact on this point if it wishes to avoid summary judgment.

Plaintiff has cited evidence to counter defendants' argument that defendants acted without negligence. However, plaintiff's citation does the court little good:

> [E]vidence in the depositions of James T. Shoaff and Michael A. Pettorossi of Provident National Bank, Bartholomew J. Milano formerly of VPI Productions and Marianne Schwartz of Fischler's Printing & Office Products, all of whom played some role in the mailing of the November 10 Notice, clearly supports the inference that Defendants and those entities retained by Defendants to print, label, fold, sort and mail the November 10 Notice negligently went about the mailing process. (The depositions of James T. Shoaff, Michael A. Pettorossi, Bartholomew J. Milano and Marianne Schwartz are incorporated herein by reference.)

Plaintiff's Brief at 2. This court has no intention of scrutinizing 164 pages of deposition transcripts to divine what evidence plaintiff's counsel believes "clearly supports" an inference of negligence.

The court is, however, reluctant to penalize plaintiff for an incomplete response on its counsel's part to defendants' motions for summary judgment. Plaintiff may very well have evidence sufficient to establish a material issue of fact

on both the negligence and causation issues. Accordingly, plaintiff SHALL HAVE until April 15, 1984, to supplement its response to defendants' motions for summary judgment so as to meet the requirements of Rule 56(e). If plaintiff does so supplement its response, defendant SHALL HAVE until April 15, 1984, to file a further reply. If plaintiff does not supplement its response by April 15, this court WILL GRANT defendants' motions for summary judgment.

/s/ Louis H. Pollak
POLLAK, J.

MARCH 27, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZIMMER PAPER PRODUCTS INCORPORATED	)	CIVIL ACTION
v.	)	ENTERED
	)	MARCH 30, 1984
BERGER & MONTAGUE, P.C., et al.	)	NO. 83-2194

ORDER

By Memorandum/Order of March 27, 1984, I granted plaintiff certain additional time to supplement its response to defendants' motion for summary judgment. Confusion seems to have crept into the final three sentences of that March 27 Memorandum/Order in that I ordered plaintiff and defendants to submit materials on April 15, 1984, a Sunday. The last three sentences of the March 27 Memorandum/Order are hereby AMENDED to read:

> Accordingly, plaintiff SHALL HAVE until April 16, 1984, to supplement its response to defendants' motions for summary judgment so as to meet the requirements of Rule 56(e). If plaintiff does so supplement its response, defendant SHALL HAVE until April 30, 1984, to file a further reply. If plaintiff does not supplement its response by April 16, this court WILL GRANT defendants' motions for summary judgment.

/s/ Louis H. Pollak
POLLAK, J.

MARCH 29, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZIMMER PAPER PRODUCTS INCORPORATED	)	CIVIL ACTION
v.	)	ENTERED OCTOBER 7, 1983
BERGER & MONTAGUE, P.C., et al.	)	NO. 83-2194

ORDER

Plaintiff in this action alleges that it never received notice of a settlement in *Glassine and Greaseproof Paper Antitrust Litigation*, Master File No. 80-914, M.D.L. No. 475. Plaintiff alleges that it thereby lost its opportunity to recover from the settlement fund established in that case.

By Order of August 2, 1983, this court granted partial summary judgment for defendants in this action. This court found for defendants on all of plaintiff's theories of liability except one; I permitted the action to go forward on the theory that defendants negligently failed to mail notice to plaintiff.

On August 3, plaintiff filed "Count II," essentially an amendment to its complaint. Count II asserts a claim for failure to mail the settlement notice regardless of defendants' fault. Defendant now moves to dismiss Count II on two grounds.

Defendants first contend that this court's summary judgment of August 2 determined that defendants owed no absolute duty to mail notice to plaintiff. The August 2 Order refers only to a claim for negligent failure to mail. However, the original complaint only asserted a negligence theory. *See* Complaint ¶ 30. Moreover, at argument, counsel for defendant implied that the court need not reach the question of absolute duty to mail. *See* Transcript of July 29 Hearing 14-15. Thus, the court must reach defendants'

second contention that they had no absolute duty to mail notice to plaintiff; the court cannot merely rely on its August 2 Order to dispose of this motion.

In *Trist v. First Federal Savings & Loan*, 89 F.R.D. 1 (E.D. Pa. 1980), Judge Lord held that a class action's settlement bound two categories of plaintiffs who had not received notice of the settlement under Fed. R. Civ. P. 23(e): Those to whom notice was mailed but who did not receive it *and* those to whom notice was not mailed.

> Barring some systematic exclusion of a particular category of class members, there is no reason why the validity of undelivered notices should turn on whether they slipped through the figurative crack before or after reaching the post office. Certainly the distinction is without a difference from the nonrecipient's point of view....

89 F.R.D. at 3. Judge Lord only excluded from the plaintiff class individuals who never received the initial notice of the action's pendency under Fed. R. Civ. P. 23(c)(2). Plaintiff Zimmer Paper Products received Rule 23(c)(2) notice in this case.

Plaintiff has cited no authority to counter the logic of the court in *Trist*. I see no reason to impose liability on defendants for non-faulty failure to mail notice to plaintiff. Accordingly, defendants' motion to dismiss Count II is GRANTED. Plaintiff may only recover if it demonstrates that defendants negligently failed to mail notice to plaintiff.

/s/ Louis H. Pollak
POLLAK, J.

OCTOBER 6, 1983

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZIMMER PAPER PRODUCTS INCORPORATED	)	CIVIL ACTION
v.	)	ENTERED
	)	AUGUST 4, 1983
BERGER & MONTAGUE, P.C., et al.	)	NO. 83-2194

ORDER

1. Plaintiff Zimmer Paper Products has brought suit, claiming that although it received notice in June of 1981 when a class action suit was initiated on behalf of all purchasers of glassine and greaseproof paper products, it failed to receive notice in November of 1981 when settlement agreements were reached. It alleges that its failure to receive notice, and resultant inability to receive its share of the now-disbursed settlement fund, were due to negligence on the part of defendants, the named representatives and counsel for the class in *Glassine and Greaseproof Paper Products Antitrust Litigation*, M.L.D. Docket No. 475.

2. Because there is no viable theory supporting imposition of civil liability on the named class representatives, plaintiffs' claims against defendants General Packaging Products, Inc., Melvin J. Schwartz Corp., Inc., Anchor Paper Co., and The Ajax Paper Tube Co. are DISMISSED with prejudice.

3. Plaintiff's allegations of negligence include the claim that defendants did not take adequate steps to insure that members of the plaintiff class received notice of the settlements reached in the underlying litigation. Plaintiff asserts that defendants had a duty to (1) send notice by certified or registered mail, (2) pursue a follow-up procedure after they failed to receive a number of proofs of

claim, (3) establish a reserve or contingency fund for class members filing late claims and (4) recommend to the court the notification procedure described in (1), (2), and (3). Complaint, ¶ 30(b)-(e). There was no such duty or combination of duties. First class mailing is sufficient to satisfy the notice requirement of Federal Rule of Civil Procedure 23(e); moreover, first class mailing comported with this court's order as to the mode of notice to be utilized. Therefore, defendants' motion for summary judgment is GRANTED with respect to the claims stated in paragraphs 30(b)-(e) of the complaint, and those claims are DISMISSED with prejudice.

4. The only surviving issue is whether defendants negligently failed to carry out the proper procedures in mailing the notice first class. Defendants' motion for dismissal or summary judgment with respect to this issue is DENIED.

5. Plaintiff is entitled to further discovery regarding the procedure followed in carrying out the first class mailing. Defendants shall answer plaintiff's interrogatories addressed to David Berger numbered 1, 2, 16-22, 33-36.

6. The deadline for discovery in this case will be October 27, 1983. Plaintiff's pretrial memorandum will be due November 3, 1983 and defendants' will be due November 10, 1983.

/s/ Louis H. Pollak
POLLAK, J.

AUGUST 2, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 84-1368

ZIMMER PAPER PRODUCTS INCORPORATED,

Appellant

vs.

BERGER & MONTAGUE, P.C.; Berger, David; GROSS & SKLAR ASSOCIATES; Rubin, Warren; RAWLE & HENDERSON; Adler, Avram G.; Barish, Marvin, I.; Levin, Arnold; Creskoff, Howard J.; KOHN SAVETT, MARION & GRAF, P.C.; Kohn, Harold; FINE, KAPLAN & BLACK, GENERAL PACKAGING PRODUCTS, INC.; MELVIN J. SCHWARTZ CORPORATION, INC., FORMERLY COMMERCIAL CARD & PAPER COMPANY, INC.; ANCHOR PAPER CO.; and THE AJAX PAPER TUBE COMPANY

(D.C. Civil No. 83-2194)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS and WEIS, *Circuit Judges* and HARRIS, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 15, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered August 4, 1983, October 7, 1983 and

* Hon. Oren Harris, United States District Court for the Eastern and Western Districts of Arkansas, sitting by designation.

May 31, 1984, be, and the same are hereby affirmed. Costs taxed against the appellant.

ATTEST: /s/ Sally Mrvos
Clerk

March 22, 1985

Certified as a true copy and issued in lieu of a formal mandate on April 29, 1985.

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk, U.S. Court of
Appeals for the Third Circuit

Costs taxed in favor of appellee,
Berger & Montague, et al., as follows: Brief....**$228.00**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1368

ZIMMER PAPER PRODUCTS INCORPORATED,

Appellant

v.

BERGER & MONTAGUE, P.C.; David Berger; GROSS & SKLAR ASSOCIATES; Warren Rubin; RAWLE & HENDERSON; Arnold Levin; KOHN, SAVETT, MARION & GRAF, P.C.; Harold Kohn; FINE, KAPLAN & BLACK,

(C. A. No. 83-2194)

SUR PETITION FOR REHARING IN BANC

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges*, and HARRIS, *District Judge**

The petition for rehearing in banc filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing in banc is denied.

BY THE COURT,

/s/ Arlin M. Adams
Circuit Judge

DATED: April 19, 1985

* As to panel rehearing only.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of

members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Supreme Court, U.S.
FILED
SEP 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-94

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ZIMMER PAPER PRODUCTS INCORPORATED,
Petitioner,

v.

BERGER & MONTAGUE, P.C.; DAVID BERGER; GROSS & SKLAR ASSOCIATES; WARREN RUBIN; RAWLE & HENDERSON; ARNOLD LEVIN; KOHN, SAVETT, MARION & GRAF, P.C.; HAROLD KOHN; and FINE, KAPLAN & BLACK,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BEST AVAILABLE COPY

BRIEF OF RESPONDENTS BERGER & MONTAGUE, P.C.; DAVID BERGER; GROSS & SKLAR ASSOCIATES; WARREN RUBIN; KOHN, SAVETT, MARION & GRAF, P.C.; HAROLD KOHN AND ARNOLD LEVIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Contending that it never received notice of a settlement reached in antecedent antitrust litigation, petitioner Zimmer Paper Products Incorporated ("Zimmer") instituted this state law malpractice action in diversity against the attorneys who had served as class counsel in the antitrust proceedings and sought damages equal to the amount it claims it would have received if it had filed a proof of claim. The district court found, on the basis of a fully discovered record, that Zimmer had failed to make out a claim of professional negligence since class counsel had scrupulously adhered to the notice procedures mandated by the district court in accordance with the dictates of due process and Federal Civil Procedure Rule 23. Therefore, in the event that Zimmer's Petition For A Writ Of Certiorari were to be granted, the question presented would be:

Did the Court of Appeals properly affirm the district court's conclusion that a claim of legal malpractice could not be sustained where it was established that class counsel, in strict accordance with custom and with court-approved notice procedures fully complying with the requirements of due process and the Federal Rules of Civil Procedure, disseminated a settlement notice by first-class mail and by publication?

PARTIES TO THE PROCEEDING

Although Avram G. Adler, Marvin I. Barish and Howard J. Creskoff are listed among the Respondents on the cover of the Petition For A Writ Of Certiorari, those individuals were dismissed from the case in the district court by stipulation of the parties, approved by the district court, and they were not parties to the proceedings in the United States Court of Appeals for the Third Circuit. Otherwise, the cover of the Petition accurately lists the parties.

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No. 85-94

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ZIMMER PAPER PRODUCTS INCORPORATED,
Petitioner,

v.

BERGER & MONTAGUE, P.C.; DAVID BERGER; GROSS & SKLAR ASSOCIATES; WARREN RUBIN; RAWLE & HENDERSON; ARNOLD LEVIN; KOHN, SAVETT, MARION & GRAF, P.C.; HAROLD KOHN; and FINE, KAPLAN & BLACK,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS BERGER & MONTAGUE, P.C.; DAVID BERGER; GROSS & SKLAR ASSOCIATES; WARREN RUBIN; KOHN, SAVETT, MARION & GRAF, P.C.; HAROLD KOHN AND ARNOLD LEVIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Zimmer's abbreviated Statement of the Case omits numerous key facts and is inaccurate in other respects.[1]

1. For example, Zimmer states that "it is undisputed that . . . Zimmer never received the November 10 Notice." Petition at 4. In fact, Zimmer never proved its non-receipt of the November 10 no-

Respondents, therefore, submit a detailed statement of the case in order fully to apprise this Court of the record and to correct the omissions, misstatements and improper inferences contained in Zimmer's Petition For A Writ Of Certiorari ("Petition").

I. INTRODUCTION

This is a diversity action alleging *malpractice*. Zimmer was a class member in antecedent antitrust litigation before the United States District Court for the Eastern District of Pennsylvania. Instead of litigating its present grievance in that docket, however, Zimmer invoked the district court's diversity jurisdiction and instituted this separate *malpractice* proceeding against counsel for the class. Two negligence claims were asserted. First, Zimmer contended that counsel for the class were negligent in recommending to the district court that settlement notice be sent to class members by first-class mail and publication and in failing to employ a follow-up procedure. Second, Zimmer asserted that counsel for the class negligently executed the court-ordered mailing.[2]

After Zimmer was accorded full opportunity for discovery, the Honorable Louis H. Pollak — proceeding throughout with caution and careful consideration of Zimmer's position — entered judgment in favor of Respondents. That judgment was affirmed by the Court of Appeals. *Zimmer Paper Products, Inc. v. Berger & Montague*, 758 F.2d 86 (3d Cir. 1985).[3]

NOTES *(Continued)*

tice. This fact always was and still is vigorously disputed by the Respondents.

2. Zimmer now appears to have abandoned this second negligence claim. Petition at *i*, 9-10.

3. The Third Circuit opinion is reproduced in the Appendix to Zimmer's Petition. Citations to the Appendix are designated "A."

II. DETAILED STATEMENT

A. Background

On or about March 3, 1980, class actions on behalf of purchasers of glassine and greaseproof paper were filed against six manufacturers and sellers of such paper (collectively, "the Class Action Defendants"), who were alleged to have engaged in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of glassine and greaseproof paper in violation of federal antitrust laws. C.A.A.312-13.[4] The actions were subsequently consolidated as the *Glassine and Greaseproof Paper Antitrust Litigation*, M.D.L. Docket No. 475 ("Antitrust Litigation"), and a plaintiff class, of which Zimmer was a member, was certified. C.A.A.14-27, 312-14.

B. June 1, 1981 Notice

After settlement agreements were negotiated with three of the Class Action Defendants, the district court ordered that notice be mailed to all class members ("the June 1 notice") and published in all regional editions of *The Wall Street Journal*, informing class members, *inter alia*: (a) that the Antitrust Litigation had been instituted on their behalf; (b) that partial settlements of that Litigation had been proposed; and (c) that, if any class member desired to be excluded from or "opt-out" of the class, such member must so advise the district court. A.3; C.A.A.32-37.

Respondents, as counsel for the class (collectively, "Class Counsel"), retained three highly qualified firms to effectuate this court-ordered mailing. A.3. Initially, a list of potential class members was obtained from the Class

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4. Citations to the joint appendix filed in the Court of Appeals are indicated by the notation "C.A.A."

Action Defendants.[5] C.A.A.33. This list then was supplied to Provcor Services, Inc. ("Provcor"), a subsidiary of the Provident National Bank, which placed each and every name and address and each and every variation thereof (regardless of how slight the deviation) on a computer list. A.4; C.A.A.171-79, 184-86. The accuracy of these names and addresses was then verified by Provcor. A.4; C.A.A.172-73. Thereafter, the computer list was used to generate gum-backed mailing labels for the June 1 notice. A.4; C.A.A.178-79. Also, since Provcor's mailing permit number was used on the class notices, Provcor was responsible for delivering the June 1 notices to the United States Postal Service. A.4; C.A.A.192-93.

VPI Reproductions, Inc. ("VPI") was retained to print and prepare the mailings. A.4; C.A.A.132-34. VPI subcontracted this job, as it did similar printing jobs, to Fischler Printing & Office Products ("Fischler"). A.4; C.A.A.129, 135-138. Bartholomew J. Milano ("Milano"), then an employee of VPI, worked with Class Counsel, Fischler and Provcor to insure that the June 1 notices were properly printed, folded, addressed and mailed. A.4; C.A.A.138, 143, 168-69, 219-23, 229. Milano delivered to Provcor for mailing copies of the June 1 notice. C.A.A.140, 143.

On June 1, 1981, separate notices were mailed by first-class mail to each class member for each name and address variation that appeared on the computer list. In total, 2,928 notices were mailed to the approximately 1,550 members of the class. A.4; C.A.A.100-01, 181-82. Seven separate June 1 notices were mailed to Zimmer: four to Zimmer's Indianapolis office and three to its San Francisco office. A.4; C.A.A.52, 102. Although the president of Zimmer arbitrarily threw away the duplicative

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5. In its Petition, Zimmer represents that the list of potential class members was compiled by Class Counsel from sales invoices and records of the Class Action Defendants. This representation is inaccurate and without support in the record.

copies of the June 1 notice, Zimmer *admits that it received at least six copies* of the June 1 notice. A.4; C.A.A.273-75, 314.

Zimmer took no action after its receipt of the June 1 notice. C.A.A.315. Specifically, Zimmer failed to object to the use of first-class mail or take any steps whatsoever to challenge the notification procedure approved by the district court in connection with the June 1 notice.

C. November 10, 1981 Notice

After settlement agreements were negotiated with the remaining three Class Action Defendants, the district court ordered that a *second notice* ("the November 10 notice"),[6] with a proof of claim form attached thereto, be mailed to class members. The Court further ordered that a summary of the November 10 notice be published in all regional editions of *The Wall Street Journal.* A.3; C.A.A.40-42.

The November 10 notice advised class members, *inter alia*: (a) that settlement by the remaining three Class Action Defendants was proposed; (b) that a settlement fund resulting from all of the settlements was available for distribution to class members; and (c) that the claim form attached to the notice must be completed and returned to the Clerk of the District Court no later than February 1, 1982 in order to enable a class member to share in the settlement fund. A.3; C.A.A.43-48.

The evidentiary record shows that Class Counsel fully complied with the order of the district court and carefully caused seven copies of the November 10 notice

6. Throughout its Petition, Zimmer bemoans the "fact" that the notification process consisted of a *single* first-class mailing. Zimmer fails to advise this Court that *seven* copies of *two* separate notices — the June 1 notice and the November 10 notice — were mailed to it and that it admittedly received at least *six copies* of the June 1 notice. A.4.

to be mailed to Zimmer.[7] The following key facts with respect to the preparation and mailing of the November 10 notice are undisputed.

1. Following procedures similar to those employed in sending the June 1 notice, Provcor once again generated gum-labels from its original computer list of purchasers. A.4; C.A.A.101, 183-84, 203. The labels were printed on folded, continuously-fed computer sheets. C.A.A.150.

2. VPI made two photocopies of the actual address labels prepared by Provcor for the November 10 mailing. C.A.A.148-51. These photocopies prove that seven such labels (Label Nos. 3709-3713, 3715, 3716) were addressed to Zimmer: four to its Indianapolis office and three to its San Francisco office. A.4; C.A.A.52.

3. On November 10, 1981, Provcor mailed approximately 3,000 notices and proof of claim forms by first-class mail to the same purchasers on Provcor's computer list to whom the June 1 notice was sent. A.4; C.A.A.100-01, 191-93, Affidavit of J. Edward Goff, IV ("Goff Affidavit"), Exhibits J and K.[8]

4. Claim forms mailed to Zenith Specialty Bag Co. (whose mailing label, No. 3702, appeared on the page

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7. Zimmer has asserted that it did not receive the November 10 notice. However, the most Zimmer could prove was its *non-awareness* of receipt of that notice. Mail from Philadelphia to Indianapolis takes approximately three to four days. C.A.A. 314. The November 10 notice would have been received by Zimmer on or about Friday, November 13 or Monday, November 16, 1981 (following the intervening weekend). However, the week of November 16 was an unusually disrupted period at Zimmer. Karl Zimmer, the President, and the first person to whom mail customarily was forwarded, was in Atlanta, Georgia on a business trip. C.A.A. 268, 176-78. The three principal backup officers responsible for reviewing Zimmer's mail were also out of town on business. C.A.A. 251, 254-55, 266-67, 304-06. The sole remaining manager was preoccupied with the installation of a new IBM computer and did not remember any piece of mail received by Zimmer that week. C.A.A. 211-17.

8. The Goff Affidavit was filed with the district court on June 2, 1983. Its table of contents is reproduced at C.A.A. 11-13.

preceding Zimmer's) and Zorn Packaging Inc. (whose mailing label, No. 3723, appeared on the same page as Zimmer's) were subsequently filed by them in the Antitrust Litigation. A.4; C.A.A.51-52, 76-79. Proof that claims were filed by these class members also confirms the fact of mailing. A.4; C.A.A.56-79.

5. A twenty-square inch summary of the November 10 notice was published in all regional editions of *The Wall Street Journal.*[9] Zimmer subscribed to that publication at all relevant times, and a copy of the midwest regional edition was mailed to Zimmer at its Indianapolis office. A.3; C.A.A.97.

In accordance with the November 10 notice, a hearing was conducted and the district court approved the proposed settlements and a proposed plan of pro rata distribution.[10] Approximately 12% of the class members filed proofs of claim and received payments equal to 5.06% of their dollar purchases.[11] C.A.A. 56.

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9. Notice was published in the southwest regional edition of *The Wall Street Journal* on November 13, the east regional edition on November 16 and the midwest and west regional editions on November 17, 1981. Goff Affidavit, Exhibit J.

10. The distributions ranged from $1,682,009.35 to $21.28. A.10; C.A.A. 56-73.

11. Zimmer's assertion that a 12% response rate is low proves nothing. It is significant that the one survey of class action response rates which Class Counsel was able to locate points in exactly the opposite direction. Herbert B. Newberg, in his treatise on class actions, undertook to survey claim response rates among a variety of classes, including antitrust classes. Among antitrust cases surveyed, claims filed as a percentage of total class members ranged from 0.28% to 43.87%. Newberg, *Class Actions* Appendix 8-4, Table I at 206-09 (2d ed. 1985). The Newberg figures reveal, among others, a 4.65% response rate for a class smaller than that certified in the Antitrust Litigation and a 7.8% response rate for a slightly larger class of 2400 class members. *Id.*

D. District Court Proceedings

In the present diversity malpractice action, Zimmer contends that it was deprived of the opportunity to partake of the settlement proceeds in the Antitrust Litigation because it allegedly did not receive the November 10 notice. C.A.A.320. Zimmer advanced two negligence claims: (1) Class Counsel were negligent in recommending that settlement notice be sent to class members by first-class mail and in failing to employ a follow-up procedure and (2) Class Counsel negligently executed the court-ordered mailing. A.5; C.A.A.322.

In response, Class Counsel filed motions to dismiss or, in the alternative, for summary judgment. On August 2, 1983, the district court granted partial summary judgment, dismissing most, but not all, of Zimmer's Complaint. A.5, 36-37. The district court held that Class Counsel had not committed malpractice because they had fully complied with the customary notice procedures approved by the court and because they had no duty to follow-up further. A.5, 36-37. The district court specifically ruled that "[f]irst class mailing is sufficient to satisfy the notice requirement of Federal Rule of Civil Procedure 23(e)." A.37. However, Judge Pollak permitted Zimmer to proceed with discovery of its claim, not pressed here, that Class Counsel "negligently failed to carry out the proper procedures in mailing the notice [and proof of claim form] first class." A.37.

Zimmer thereafter conducted extensive discovery, inquiring into the generating, printing, folding, addressing, mailing and handling of the November 10 notice. A.5. Upon completion of all discovery, Class Counsel again filed motions for summary judgment. The crux of these motions was threefold.

First, despite Zimmer's extensive discovery, there was no evidence suggesting that Class Counsel failed to select qualified firms to effectuate the mailings of class notices. To the contrary, the uncontroverted evidence

proved that Class Counsel met their duty to select highly qualified firms to print and mail the class notices. Further, the undisputed facts proved that the address labels generated by Provcor, seven of which were addressed to Zimmer, were affixed to copies of the November 10 notice and that such notices were mailed to Antitrust Litigation class members. A.4; C.A.A.52, 101-03. Indeed, such notices were mailed to, and received by, a class member whose address label appeared on the same page as Zimmer's labels. A.4; C.A.A.52, 78-79. Second, even assuming, *arguendo*, that Class Counsel, Provcor, VPI or Fischler may have been negligent in some aspect of the mailing — which they were not — Zimmer failed to show that any such negligence caused the November 10 notice not to be mailed to Zimmer. Third, regardless of such mailing, Zimmer was a subscriber to *The Wall Street Journal* and was at leas notified by publication since a summary of the November 10 notice was published in a copy of the *Journal* mailed to Zimmer. A.3; C.A.A.97.

Only after virtually being forced to do so, Zimmer finally responded to Class Counsel's summary judgment motions.[12] However, despite extensive discovery, Zimmer could only claim that a variety of "safeguards" were not taken (without offering any proof that Class Counsel had a duty to employ such "safeguards") and that several individuals whose firms were involved in the mailing process could not recall every detail of each stage of the mailing. Zimmer then invited the district court to *speculate* that labels and notices *might* have been lost or misplaced.

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12. Initially, Zimmer filed only a patently inadequate three-page, conclusory and unsupported response to Class Counsel's motions for summary judgment. However, by Order dated March 27, 1984, the district court *sua sponte* gave Zimmer an opportunity to "supplement" its deficient response. A.31-32. By that March 27 Order, the district court also held that publication in *The Wall Street Journal* was not by itself sufficient to entitle Class Counsel to summary judgment. A.30.

On May 30, 1984, the district court granted Class Counsel's motions for summary judgment, finding that Zimmer "presented no evidence which indicate[d] that VPI or Fischler negligently failed to affix all 2928 labels or that Provcor negligently failed to mail all 2928 notices." A.26. That May 30, 1984 Order, together with the earlier Orders, disposed of this case in its entirety. A.22-27.

E. Third Circuit Court of Appeals Proceedings

On June 25, 1984, Zimmer appealed from the district court's Orders. In a lengthy opinion, the Court of Appeals for the Third Circuit affirmed all aspects of the district court's judgment. A.1-15.

The Court held that Class Counsel were neither negligent in recommending the use of first-class mail and publication nor in their execution of the mailing.[13] In particular, the Court of Appeals found that Class Counsel satisfied their fiduciary duty to notify class members by employing first-class mail and publication, procedures that are traditionally used and accepted throughout the United States and that fully complied with due process requirements, Federal Rule of Civil Procedure 23 and customary practice among class action counsel.

> The bounds of fiduciary duty are undoubtedly not easy to define, but certainly *we must be guided by the fact that the practice here alleged to breach such duties is a customary one, and has been approved, after careful judicial scrutiny, not only in this case but in legions of others.* If class counsel in this case have breached their fiduciary duties, attorneys throughout the country who have complied with court orders and a Supreme Court-approved notice

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13. The dissent did not take issue with the majority's affirmance of Judge Pollak's ruling that Zimmer had failed to establish that the November 10 mailing was negligently executed.

procedure may well be subject to malpractice lawsuits by anyone who alleges that he or she did not receive notice of the opportunity to file a claim.

A.9 (emphasis added; footnote omitted).

Dissatisfied with the Third Circuit's decision, Zimmer petitioned for rehearing in banc. Its petition was denied on April 19, 1985. A.40.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The sole issue before this Court is whether Class Counsel were negligent in selecting the procedure by which the November 10 notice was disseminated. Zimmer has failed to advance any reason why the district court's determination in this diversity action for *malpractice*, affirmed by the Court of Appeals for the Third Circuit, merits review. The decision of the Third Circuit was concededly not in conflict with that of any court of appeals nor with that of a state court of last resort. The courts below did not decide a federal question, much less an important federal question, in a manner which conflicts with applicable decisions of this Court or which calls for the exercise of this Court's supervisory powers. Indeed, as Zimmer's Petition For A Writ Of Certiorari makes clear, Zimmer raises no federal question at all. Rather, it seeks to reopen an issue of *legal malpractice* while, at the same time, conceding that it is unable to define a standard against which to gauge Class Counsel's performance.[14] The decisions of the courts below follow longstanding and controlling precedent, do not conflict with the decision of this Court or any court of appeals, and present no issue for review by this Court.

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14. This concession alone is fatal to Zimmer's malpractice action. *See* p. 14 *infra*.

II. ARGUMENT

A. The Sole Issue Addressed In Zimmer's Petition Is Whether The Courts Below Correctly Rejected Zimmer's Malpractice Claim.

In Pennsylvania, three essential elements must be established where, as here, a cause of action for malpractice or professional negligence is brought:

> 1. The employment of the attorney or other basis for duty;
>
> 2. The failure of the attorney to exercise ordinary skill and knowledge; and
>
> 3. That such negligence was the proximate cause of damage to the plaintiff.

Schenkel v. Monheit, 266 Pa. Super. 396, 405 A.2d 493 (1979) (affirming summary judgment against former client); *Gans v. Mundy*, 762 F.2d 338 (3d Cir. 1985) (applying *Schenkel* and affirming summary judgment in legal malpractice action). *See also*, *Hoyer v. Frazee*, 323 Pa. Super. 421, 426, 470 A.2d 990, 993 (1984) (standard of care in a legal malpractice case is whether the attorney has exercised ordinary skill and knowledge); *Lentino v. Fringe Benefit Employee Plans, Inc.*, 611 F.2d 474, 480 (3d Cir. 1979) (standard of care in malpractice action is measured by skill generally possessed and employed by practitioners of the legal profession).

In rejecting Zimmer's claim that Class Counsel were negligent in choosing to disseminate the November 10 notice by first-class mail, the courts below correctly applied the relevant standard: there can be no finding of malpractice in the absence of evidence that Class Counsel failed to exercise the skill and knowledge ordinarily exercised by class action counsel. Where, as the Third Circuit ruled, Class Counsel "has done all that is generally done, all that due process requires, and all that the court ordered," A.9, Zimmer's malpractice claim was

properly dismissed. Such dismissal gives rise to no issue worthy of *certiorari*.

Evidence of customary procedures and of procedures which have repeatedly been determined to satisfy the requirements of due process and the Federal Rules of Civil Procedure is not, as Zimmer misguidedly suggests at page 11 of its Petition, irrelevant to this action for professional negligence. On the contrary, it is the crux of this proceeding, since only proof that Class Counsel departed from the standard of care ordinarily exercised by attorneys would have been sufficient to make out a case of legal malpractice. Yet, the duties which Zimmer contends Class Counsel negligently failed to undertake have been deemed unnecessary by both class action practitioners and by the courts. *See* pp.15-21, *infra*. Even if such duties were to be mandated in the future, the failure to have done so in the past clearly would not constitute malpractice. *Cf. Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974) ("[w]e are loath to impose such a [notice] requirement retroactively").

Zimmer's insistence that Class Counsel had a "fiduciary duty" to do "more" than was done -- over and above adherence to the requirements of Rule 23 and due process and compliance with customary procedures and court orders — would, in effect, exceed the negligence standard clearly and unequivocally laid down for legal malpractice actions. Zimmer, however, has not cited this Court to a single precedent which would support this novel proposition.[15] The Third Circuit correctly recognized:

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15. The cases cited by Zimmer on pages 6 and 7 of its Petition, which address routine attorney-client disputes ranging from misappropriation of client funds, *Bar Association of Baltimore v. Marshall*, 269 Md. 510, 307 A.2d 677 (1973), to issues of confidentiality of client communications, *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2nd Cir. 1977) and conflicts of interest, *Baker v. Humphrey*, 101 U.S. 494 (1880), shed no light whatsoever on the issue presented for *certiorari*. *Greenfield v. Villager*

> [T]he practice here alleged to breach [the bounds of fiduciary] duties is a customary one, and has been approved, after careful judicial scrutiny, not only in this case but in legions of others.

A.9.

In its zeal to avoid the force of such authority, Zimmer goes so far as to assert that "[t]o date . . . no court has defined or delimited a workable standard of conduct against which class counsel's fiduciary obligation to absent class members can be measured." Petition at 6. Indeed, Zimmer professes to have been "unable to cite the Court of Appeals to a single reported decision which examined the nature and extent of an attorney's fiduciary duty to his client in the context of a federal class action," contending that there is a "virtual absence of any relevant authority in this area." Petition at 9. This is simply not correct, as is discussed below. However, if it *were* correct, Zimmer's inability to demonstrate a standard against which to measure Class Counsel's performance *would itself be fatal* to its malpractice action.

NOTES *(Continued)*

Industries, Inc., 483 F.2d 824 (3d Cir. 1973), the only case which seeks to define the parameters of Class Counsel's duty to communicate with absent class members, refutes Zimmer's position. In *Greenfield, no* individual notice was sent, by first-class mail or otherwise. Instead, notice of a securities class action settlement hearing was simply published "in two newspapers on two occasions several days apart during the East Coast summer vacation period." 483 F.2d at 830-31, 833. The failure to provide individual notice was, the court held, a breach of counsel's fiduciary duty. Where, as here, Class Counsel complied with customary practice and court order by mailing not one but seven individual notices to Zimmer, *Greenfield's* measure of the fiduciary duty has been fully satisfied.

B. The Decisions Below Are Consistent With Applicable Due Process Decisions of This Court.

Under the exacting standard of the Due Process Clause, this Court has specifically mandated the very notice procedure recommended by Class Counsel and ordered by the district court: "ordinary mail" to persons whose names and post office addresses are known and notice by publication to those whose interests or addresses are unknown. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950). *See also, Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974) (due process requires individual notice to class members by first-class mail). *Accord Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) (notice by mail meets constitutional precondition to a proceeding which will adversely affect a party's property interests).

This Court recently confirmed *Mullane's* continued vitality and upheld the use of first-class mail as the appropriate vehicle for the dissemination of important class action notices. In *Phillips Petroleum Co. v. Shutts*, ___U.S. ___, 105 S.Ct. 2965, 86 L.Ed. 2d 628 (1985), this Court held that due process requires that an absent member of a plaintiff class seeking money damages be accorded an opportunity to execute and return an "opt out" form and expressly found that the sending of such a notice by first-class mail satisfies due process.

Class Counsel mailed Zimmer not one, but *seven* copies of the November 10 notice, addressed variously to "Zimmer Paper Co.", "Zimmer Paper Products", "Zimmer Paper Products Inc." etc. In addition, a synopsis of the notice was published in a national publication to which Zimmer in fact subscribed. *Contrast Mullane*, 339 U.S. at 315. If their performance is measured against the standard set forth by this Court, it is clear that Class Counsel scrupulously adhered to and, indeed, exceeded the mandate of *Phillips Petroleum*, *Eisen* and *Mullane*.

C. Respondents Have Fulfilled Any Applicable Fiduciary Duty To Communicate With Class Members By Adhering To The Traditionally Accepted And Usual Course Of Class Action Proceedings.

The notice procedure approved here by the district court and fully carried out by Class Counsel was identical to notice procedures regularly ordered under each of the express notice provisions of Federal Civil Procedure Rule 23 — i.e., Rule 23(c)(2),[16] Rule 23(d)(2) and Rule 23(e).[17]

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16. Time and again, federal courts have concluded that first-class mail suffices to meet the standard of Rule 23(c)(2). *See, e.g., Cayuga Indian Nation v. Carey,* 89 F.R.D. 627, 632-33 (N.D.N.Y. 1981) (individual notice of class certification by first-class mail, coupled with notice by publication, satisfies the requirements of Rule 23); *Trist v. First Federal Savings & Loan Ass'n,* 89 F.R.D. 1, 2 (E.D.Pa. 1980) (individual mail to last-known address satisfies exacting "best practicable" standard of Rule 23(c)(2)); *Piel v. National Semiconductor Corp.,* 86 F.R.D. 357, 375 (E.D.Pa. 1980) (best notice practicable under Rule 23(c)(2) is notice by first-class mail); *Oneida Indian Nation of Wisconsin v. New York,* 85 F.R.D. 701, 709 (N.D.N.Y. 1980) (ordering individual notice of class certification by first-class regular mail and publication in *The New York Times*); *Brandt v. Owens-Illinois, Inc.,* Fed.Sec.L.Rep. (CCH Transfer Binder, '73-74 Dec.) ¶94,355 at 95,187 (S.D.N.Y. 1974) (directing that individual notice by first-class mail be given to all members of Rule 23(b)(2) and (b)(3) subclasses). *Cf. Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 167 & n.7, 173 (1974) (district court erred in failing to direct individual notice to all class members on grounds that first-class mailing was too costly). *See Manual for Complex Litigation* (Second) §41.4.1 (Feb. 1985 Draft) (directing notice of class certification to be given by first-class mail).

17. Under the standard of Rule 23(d)(2) and (e), first-class mail has repeatedly been deemed sufficient to apprise class members of a settlement and their entitlement to recover thereunder. *See, e.g., Walsh v. Great Atlantic & Pacific Tea Co.,* 726 F.2d 956, 960, 962-64 (3d Cir. 1983) (notice by first-class mail plus publication "clearly adequate" under Rule 23(e)); *State of West Virginia v. Chas. Pfizer & Co.,* 440 F.2d 1079, 1083 (2d Cir. 1971), *cert. denied,* 404 U.S. 871 (1971); *Williams v. Weirton Steel Div.,* 31 Fair Empl.

The Third Circuit carefully considered and rejected Zimmer's contention that the specific facts of this case warranted a departure from the overwhelming case law which holds that notice by first-class mail satisfies not only the mandate of Rule 23(e) but the more exacting standard of Rule 23(c)(2). In response to Zimmer's contention that a follow-up procedure was called for by the

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Prac. Cases (BNA) 1415, 1433-34 (N.D.W.Va. 1983) (directing notice of settlement to be sent by first-class mail); *Alliance to End Repression v. City of Chicago*, 561 F.Supp. 537, 546, 548 (N.D.Ill. 1982) (notice of settlement sent by first-class mail was "fair and adequate"); *Trist v. First Federal Savings & Loan Ass'n., supra*, 89 F.R.D. at 3 (Rule 23(e) does not demand perfect mailing; individual mail to last known address suffices); *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 65 (N.D.Calif. 1976); *Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217, 227 (S.D.N.Y. 1973); *National Organization for Women v. Bank of California*, 5 Empl. Prac. Dec. (CCH) ¶8617 at 7809 (N.D.Calif. 1973). *See also Manual on Complex Litigation (Second), supra*, §§41.4.2, 41.4.3 (sample order for hearing on proposed class settlement directs notice by first-class mail).

In addition, federal courts have consistently approved the mailing plus publication of proof of claim forms for the participation in a settlement fund as an exercise of their supervisory powers over class actions under Rule 23. *E.g., Weinberger v. Kendrick*, 698 F.2d 61, 68-69, 71 (2d Cir. 1982), *reh. gr. in part, reh. den. in part*, CCH Fed.Secur.L.Rep. ¶99,074 (2d Cir. 1983), *cert. denied*, 464 U.S. 818 (1983) (proofs of claim filed as a result of notice by mail and publication superintended by district court under Rule 23); *In Re Gypsum Antitrust Cases*, 565 F.2d 1123, 1125-27 & n.5 (9th Cir. 1977) (court-ordered mailing of claim form describing procedure for participating in settlement fund was proper under Rule 23(d)(2); "it is fair and reasonable to proceed, as the district court did here, by mailing claim notices to last-known addresses of potential class members and by publication"); *Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1184 (2d Cir. 1974) (district court properly ordered mailing and publication of notice fixing date for filing sworn statement of claim); *State of West Virginia v. Chas. Pfizer & Co., supra*, 440 F.2d at 1083 (2d Cir. 1971) (district court properly ordered notice of filing deadline for individual claims to be given to wholesaler-retailer class by first-class mail; consumer class members notified of claim filing deadline by publication); *Hinkley v.*

12% response rate to the November 10 notice, the Third Circuit noted:

> [T]he 12% response rate does not appear to be determinative. Although at first glance this response rate appears low, there has been considerable debate over whether or not it is in fact low. While the defendants have cited studies by Herbert Newberg, author of a treatise on class actions, to demonstrate that a 12% rate is in line with response rates in similar settlements, Zimmer has come forward with nothing to suggest that the rate is uncharacteristically low.

A.11 (citations omitted). *See* n.11 *supra*. The Third Circuit also weighed and rejected Zimmer's further contention that the amount of the settlement and the number of class members mandated a follow-up procedure. A.10.

Finally, Zimmer has not cited a single case in which any court has held that a class action counsel has a fiduciary duty to assure actual knowledge as to the contents of any notice or to follow up where class members

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NOTES *(Continued)*

DuPont, C.A. No. 82-1283 (E.D.Pa. 1982) (by Order dated November 23, 1982, court approved mailing of notice of settlement and proof of claim by first-class mail); *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 65 (N.D.Calif. 1976) (notice of proposed class action settlement, advising class members of right to file a claim for a portion of settlement fund, sent by first-class mail); *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 622 (D.Colo. 1974) (requirements of Rule 23(e) satisfied by mailing of individual notice containing instructions regarding the filing of claims, together with publication of copies of the notice in *The Wall Street Journal*); *Bleznak v. C.G.S. Scientific Corp.*, 387 F.Supp. 1184, 1191 (E.D.Pa. 1974) (order directing mailing of proof of claim form by first-class mail pursuant to Rule 23(c)(2) and 23(d)); *Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217, 227 (S.D.N.Y. 1973) (directing the mailing of proof of claim forms by first-class mail, along with class notice). *See Manual on Complex Litigation (Second), supra*, §41.4.4 (directing dissemination of proof of claim forms by first-class mail).

fail to file claim forms.[18] On the contrary, federal courts have rejected attempts to impose upon attorneys any duty — fiduciary or otherwise — to perform extensive searches for missing addresses, to mail out notice by certified or registered mail, to effect personal service or to direct notice to counsel for class members who have instituted individual actions.[19]

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18. The cases cited by Zimmer at pages 11 and 12 of its Petition do not support the notice procedure it urges this Court to mandate retroactively. First, none imposes a follow-up requirement of the type Zimmer proposes here. Second, they are distinguishable on their facts. Three of the cases — *Commonwealth of Pennsylvania v. Local Union 542*, 555 F.Supp. 1109 (E.D.Pa. 1982); *Kyriazi v. Western Electric Co.*, 527 F.Supp. 18 (D.N.J. 1981), and *Vuyanich v. Republic National Bank*, 521 F.Supp. 656 (N.D.Tex. 1981), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984) — involve notice to a plantiff class in employment discrimination cases where, as the Third Circuit recognized, A.11, class members are less sophisticated and less likely to heed a notice sent by ordinary mail. Similarly, *Payton v. Abbott Labs*, 83 F.R.D. 382 (D.Mass. 1979), *vacated*, 100 F.R.D. 336 (D.Mass. 1983) involved notice of certification of a class composed of girls and young women exposed to diethylstilbestrol *in utero*, a situation "where class members may be presumed to be less aware of a notice's ramifications." A.11. In *Liddell v. Board of Education*, 567 F.Supp. 1037 (E.D.Mo. 1983), registered mail was sent *only* to those who (unlike Zimmer) had submitted written comments on the settlement plan. Finally, in *Appleton Electric Co. v. Advance United Expressways*, 494 F.2d 126 (7th Cir. 1974), members of the plaintiff class were in fact sent notice by *first-class mail*. Notice by certified mail was sent only to members of the defendant class.

Entin v. Barg, 412 F.Supp. 508 (E.D. Pa. 1976), is also inapposite. In that securities action, the identity of many class members was obscured by the fact that many shares were held by brokerage houses in "street names" and that, in the intervening years, a large number of the brokerage houses had failed. 412 F.Supp. at 512. In light of those special and unusual circumstances, the court ordered that a service be engaged to find current addresses for potential class members.

19. *E.g., Mullane v. Central Hanover Bank and Trust Co., supra*, 339 U.S. at 317-18 ("impracticable and extended searches

Zimmer dismisses the abundance of case law directing notice in a manner identical to the procedure utilized here as mere evidence of custom. Petition at 11. Even if this were so, the courts below were certainly entitled in this malpractice action to consider such "custom" in concluding that the notice provided by Class Counsel was such notice as would be provided by an attorney exercising the skill and knowledge ordinarily exercised by class action counsel. But, of course, these cases are not mere evidence of what legal practitioners customarily have considered to be sufficient notice. More important, they reflect uniform acceptance by the courts of the sufficiency of the very notice procedure utilized here.

In sum, the decisions of the courts below are consistent with an extensive body of appellate and district court case law which holds that notice by first-class mail is sufficient. Zimmer's indirect challenge to the sufficiency of the notice procedure was properly rejected in this legal malpractice action since, as the Third Circuit correctly held, there was no breach of a fiduciary duty

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NOTES *(Continued)*

[for beneficiaries of a trust] are not required"); *National Student Marketing Litigation v. Barnes Plaintiffs*, 530 F.2d 1012, 1015 (D.C.Cir. 1976) (affirming order denying class members' motion for exclusion from the class made on grounds that class members purportedly never received notice of class certification; "[t]he fact that the Barnes plaintiffs had instituted an individual action imposed no obligation to treat them as unique and direct specific notice to [their] attorney"); *Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1185-86 (2d Cir. 1974) (there is no requirement that notice of a class settlement be sent to attorneys for members of the class who have instituted individual actions); *Cayuga Indian Nation v. Carey*, 89 F.R.D. 627, 632-33 (N.D.N.Y. 1981) (certified mailing or personal service of notice of class certification was not required); *Waligunda v. Sperry Rand Corp.*, 25 F.R.Serv.2d 368, 371 (E.D.N.Y. 1978) (notice of class action settlement need not require return receipt); *Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217, 227 (S.D.N.Y. 1973) (expressly rejecting the suggestion that notice be sent by certified mail and directing first-class mailing of proof of claim).

where, as here, Respondents meticulously adhered to a widely accepted notice procedure approved not only by the district court here but also by "legions of others." A.9.

D. The Exercise of This Court's Supervisory Powers Is Uncalled For Particularly Where, As Here, The Very Structure Of Rule 23 Militates Against Zimmer's Action.

The thrust of Zimmer's Petition is, in essence, a collateral attack on the district court's original approval of the November 10 notice sent to the class.[20] Zimmer is

20. Zimmer's very ability to mount such an attack is problematic. *Lasky v. International Union (UAW)*, 638 F.2d 954 (6th Cir. 1981) suggests that, at the outset, Zimmer is collaterally estopped and barred by *res judicata* from challenging the notification procedure mandated by the district court. In *Lasky*, disgruntled class members asserted a malpractice claim against the class action attorney, alleging that the procedures used to notify class members of a proposed settlement did not adequately protect the interests of the class. The *Lasky* court, however, rejected the claim, finding that the class members were collaterally estopped from asserting that their legal representation was inadequate:

> "Since [the class members] had the opportunity to object to the legal representation at the prior settlement hearing and *since a finding that the class was adequately represented is necessary for finding the settlement was fair and reasonable,* which in turn was essential to approving the settlement, [*the class members] are collaterally estopped from now asserting that the legal representation was not adequate. . . .*"

Lasky v. International Union, (UAW), supra, 638 F.2d at 957 (emphasis added; citations omitted). Here, the procedure for communicating the November 10 notice which Zimmer attacks in this action — first-class mail plus publication — was identical to the procedure employed in communicating the June 1 notice to class members, six copies of which Zimmer admittedly received. A.3. Zimmer did not seek to challenge the adequacy of that notification procedure and, by failing to do so, Zimmer is collaterally estopped and barred by *res judicata* from challenging the adequacy of the identical notification procedure used in connection with the November 10 notice. *Lasky v. International Union (UAW), supra*, 638 F.2d at 957; *Cramer v. General Telephone & Electronics Corp.*, 582 F.2d 259, 266

requesting this Court to exercise its power of supervision to correct an injustice it allegedly suffered, not in this malpractice case, but in the Antitrust Litigation. One must, however, keep squarely in focus the fact that the notice procedure employed by Class Counsel not only fully complied with Rule 23 of the Federal Rules of Civil Procedure, due process requirements, and notice procedures customarily employed by class action counsel, but also was ordered and approved by the district court in the context of ongoing class action litigation.

Zimmer seeks to isolate Class Counsel as being responsible for what it asserts to be an inadequate notice procedure and argues that Class Counsel is not insulated from liability "because [they] complied with the order of the District Court issued to satisfy the due process requirements of Federal Rule of Civil Procedure 23(e)." Petition at 4. However, Zimmer misperceives the significance of the duty to review and approve the notice procedure which is explicitly imposed on the district court by Rule 23. That significance is three-fold.

First, of course, an approval is required precisely so that the question of the adequacy of the notice procedure can be determined. Such approval calls for the sound use of discretion. Of course, no matter what notice procedure might be adopted in a given class action, *someone* could assert after the fact that it was inadequate. There is always "something more" that, in the view of the unhappy class member, could have been done. However, the *res judicata* consequences which attend class action litigation, consequences in which all of the class members

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NOTES *(Continued)*
(3d Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *Hubicki v. ACF Industries, Inc.*, 484 F.2d 519, 524 (3d Cir. 1973). *See also Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974) (June 1 notice imposed a "duty of due diligence to keep abreast of settlement developments").

and defendants have an interest, cannot be so lightly disregarded. There is a need for both orderliness and uniformity of result. Someone, therefore, must screen the proposed manner of notice and resolve the question of whether it is adequate.

Second, the question of adequacy is specifically remitted to a judge's determination. The language of Rule 23 is unequivocal. Notice is to be given as "the *court* shall direct," "the *court* may direct" or "the *court* directs." F.R.C.P. 23(c)(2), 23(d)(2), 23(e). The role of the district court in class action litigation under Rule 23 is not an incidental one. It is pivotal.[21] It has accordingly been repeatedly stated that notice under Rule 23 is "the court's rather than any party's." 3B Moore, *Federal Practice*, ¶23.55 at 23-443 (2d ed. 1985); *Manual For Complex Litigation*, (5th ed. 1982), §1.45 at 45-46.

Third, the question of the manner of notice is to be determined by the court *before* the notice is sent. At the very latest, it must be determined by that court prior to approval of the settlement and the entry of final judgment. Any question as to the sufficiency of the notice then becomes merged into the judgment itself.

In short, the question of what the notice procedure should be is a matter uniquely to be determined in the original class action proceedings. It is *not* a matter to be determined after the fact in a subsequent malpractice action or on a petition for a writ of certiorari seeking the exercise of this Court's power of supervision. Any contrary conclusion would have grave consequences not

21. Zimmer's citation from *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 14-15 (S.D.N.Y. 1980) is irrelevant. As a full reading of that case makes clear, it is only in the *discovery stage* that the class action judge may seek to minimize his or her involvement in the case. Equally inapposite is *Johnson v. Shreveport Garment Co.*, 422 F.Supp. 526, 534 (W.D.La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978), Petition at 7, which addresses the duty of class counsel to vigorously discover and try an employment discrimination class action. At no time has Zimmer ever suggested that Class Counsel failed to vigorously pursue the class' antitrust claims.

only for the finality of the settlement approved in the Antitrust Litigation, but also for the finality of all completed class action settlements and the ability to resolve any future class litigation.

CONCLUSION

For the reasons set forth above, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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CLERK

No. 85-94 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ZIMMER PAPER PRODUCTS INCORPORATED,
Petitioner,

v.

BERGER & MONTAGUE, P.C.; DAVID BERGER; GROSS & SKLAR ASSOCIATES; WARREN RUBIN; RAWLE & HENDERSON; ARNOLD LEVIN; KOHN, SAVETT, MARION & GRAF, P.C.; HAROLD KOHN; and FINE KAPLAN & BLACK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS RAWLE & HENDERSON and FINE KAPLAN & BLACK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether, under Pennsylvania law, liability for legal malpractice should be imposed upon lawyers for alleged failure to give adequate notice of a settlement of a class action case to a member of the class, where the notice procedure they followed concededly complied with the requirements of the trial court's order governing notice, the applicable Rules of Civil Procedure, and the United States Constitution, and where no previous case or other authority has ever imposed such liability?

STATEMENT PURSUANT TO RULE 21.1(b)

Avram G. Adler, Marvin I. Barish, and Howard J. Creskoff are listed by Petitioner among the Respondents on the cover of the Petition for a Writ of Certiorari; but those individuals were dismissed from the case in the District Court by stipulation of the parties and order of the District Court, and they were not parties to the proceedings in the United States Court of Appeals for the Third Circuit. Otherwise, the cover of the Petition accurately lists the parties.

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IN THE
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ZIMMER PAPER PRODUCTS INCORPORATED,
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BRIEF OF RESPONDENTS RAWLE & HENDERSON and FINE KAPLAN & BLACK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This is a diversity legal malpractice case. The plaintiff, Zimmer Paper Products Incorporated ("Zimmer"), was a class member in the *Glassine and Greaseproof Paper Antitrust Litigation*, M. D. L. Docket No. 475 (the "Antitrust Litigation"), a price-fixing case brought on behalf of purchasers of glassine and greaseproof paper

against six manufacturers and sellers of such paper and ultimately settled. Zimmer later brought the present case against counsel for the class, claiming that, because of class counsel's negligence, Zimmer had failed to file a proof of claim in the Antitrust Litigation and therefore had not shared in the settlement proceeds. This case was assigned to the Honorable Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania, who had also been the trial judge in the Antitrust Litigation.

Zimmer claimed in its Complaint that it had not received any notice of the settlement of the Antitrust Litigation or of the requirement that it file a proof of claim. Discovery showed that an initial notice to class members in the Antitrust Litigation was dated June 1, 1981, and was sent, pursuant to an order by Judge Pollak, by first class mail and by publication in all regional editions of *The Wall Street Journal*. C.A. App. 32-33.[1] That notice informed class members of the institution of the Antitrust Litigation, partial settlements, their membership in the class, and the procedures to follow if they wished to opt out. [C.A. App. 34-37]. Zimmer's name appeared seven times on the computer-generated list of prospective class members (because its name appeared on the Antitrust Litigation defendants' customer lists in seven slightly different variations, including addresses in both Indianapolis and San Francisco), and Zimmer admits to having received six of those notices, some in each city. [C.A. App. 102, 273-75, 314].

After class counsel had achieved proposed settlements with the remaining defendants, class counsel sent, pursuant to an order by Judge Pollak, a November 10, 1981 notice of the settlements and of the plan for distribution of the fund, along with proof of claim forms,

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1. Citations to "C.A. App." are to the Appendix filed in the United States Court of Appeals for the Third Circuit.

to all class members (over 1500 of them) in the same manner as on June 1 — by first class mail and by publication in *The Wall Street Journal*.

Discovery showed that class counsel had hired the same reputable and experienced companies to accomplish the mailings of both the June 1 and November 10 notices. Zimmer's name appeared on seven gummed mailing labels on the November 10 list just as it had on the June 1 list. The labels were generated on a fan-folded backer and, even though Zimmer later claimed that it had not received notice, class members whose labels appeared on the same page as Zimmer's and on the page before Zimmer's obviously received notice because they filed proofs of claim. The evidence showed that the mailing was accomplished with due care, including the mailing of seven notices to Zimmer. [App. to Pet. for Cert., 25-26].

Zimmer claims that it never received a notice (although Zimmer did subscribe to *The Wall Street Journal* at the time the notice was published), and it never filed a proof of claim. C.A. App. 97. Nine months after the settlement proceeds had been distributed to those class members who had filed proofs of claim, Zimmer started this suit.

Judge Pollak granted partial summary judgment for the defendants on some of Zimmer's claims and later, after much discovery, granted summary judgment on the rest. The United States Court of Appeals for the Third Circuit affirmed Judge Pollak's decisions in their entirety, holding that class counsel were not liable for legal malpractice where they had fully complied with the District Court's order providing for notice to the class, had observed the requirements of Rule 23, and had satisfied the standards for due process. The Third Circuit said:

> Once a court, whose discretionary order is presumptively valid, has properly sanctioned such a notice

> procedure, moreover, a complaining party faces a standard at least as high as abuse of discretion in seeking to show malpractice by counsel who followed the court's order. There is no basis in the record for saying that the circumstances here support any such conclusion. App. to Pet. for Cert., 12.

The Court also made very clear that its decision was narrow and based upon the facts of this case:

> We do not hold today that first-class mail and publication will always suffice, either under a due process or a fiduciary duty analysis. App. to Pet. for Cert., 12.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari asks this Court to reverse the courts below on a question of Pennsylvania state law. Not only is there no question of federal law involved here, but the decision of state law by the courts below is not in conflict with any decision of any other court, state or federal. The courts below considered a detailed factual record which makes this case in most respects sui generis, and the case does not present an issue of general importance. On the contrary, it presents a narrow question which has not been the subject of litigation in the state or federal courts. Moreover, the decision of the lower courts was correct.

ARGUMENT

I. THERE IS NO FEDERAL QUESTION AND NO CONFLICT WITH OTHER COURTS

Zimmer brought this suit in the District Court solely under diversity of citizenship jurisdiction, seeking damages under state law for legal malpractice. It is undisputed that in the Antitrust Litigation class counsel gave the notice which the District Court's order authorized —

first class mail and publication in *The Wall Street Journal*. Zimmer is not now arguing that Judge Pollak's order violated Federal Rule of Civil Procedure 23(e) or the requirements of due process. Nor could it. *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156 173-77 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Thus, Zimmer's Statement of the Question Presented concedes that class counsel satisfied both Rule 23 and the requirements of due process.

Zimmer asks this Court to overrule the courts below on a question of state law.[2] This Court has observed that:

> . . . [O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts . . . .

Huddleston v. Dwyer, 322 U.S. 232, 237 (1944).

In Pennsylvania, where class counsel principally practice and where the Antitrust Litigation was brought and settled, actions for legal malpractice are governed by the state common law of negligence. *E.g., Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983). A Pennsylvania appellate court recently affirmed that issues of "legal malpractice . . . should be decided upon common law negligence theories." *Brennan v. Reed, Smith, Shaw & McClay*, 304 Pa. Super. 399, 413, 450 A.2d 740, 747 (1982). The same is true of a claim for breach of a fiduciary relationship. *E.g., Ruth v. Crane*, 392 F. Supp. 724 (E.D. Pa. 1975), *aff'd mem.*, 564 F.2d 90 (CA3 1977).

The decision below, affirming Judge Pollak's holding that class counsel had not breached any duty to Zimmer, does not conflict with any other decision, state or federal.

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2. The facts that this claim arose out of conduct of counsel in federal litigation and that the fedral courts have a general supervisory control over the conduct of counsel in federal court do not alter the state law character of Zimmer's claim for relief and does not change the fact that jurisdiction is based solely on diversity of citizenship. *E.g., Gans v. Mundy*, 762 F.2d 338 (CA3 1985).

In fact, Zimmer's claim that class counsel owes a duty to provide notice beyond the requirements of Rule 23 and due process appears to be unique; we have found no case which resembles it, and Zimmer itself styles its claim as one "of first impression," Pet. for Cert., 5. Even if there were such a case, however, this case is sufficiently fact-specific to make it unlikely that any holding by this Court could have general applicability. The opinion of the Court of Appeals shows on its face that the result turns on the unique facts of this case. App. to Pet. for Cert., 12-13 and n.8.

II. THERE IS NO ISSUE OF GENERAL IMPORTANCE AND THE CASE BELOW WAS DECIDED CORRECTLY

In this Court, Zimmer argues only that class counsel had a fiduciary duty to "assure" that Zimmer received the November 10 notice by doing more than carrying out Judge Pollak's order concerning notice to the class.

Under Pennsylvania law, a plaintiff must prove that a lawyer has failed to exercise ordinary skill and knowledge before he can recover on a malpractice claim. *Schenkel v. Monheit,* 266 Pa. Super. 396, 405 A.2d 493 (1983); *Gans v. Mundy,* 762 F.2d 338 (CA3 1985). There were more than 1500 class members in the Antitrust Litigation. In accordance with Judge Pollak's order, Zimmer and the rest of the class members had received the June 1, 1981 notice by first class mail, as well as by publication in all regional editions of *The Wall Street Journal,* informing them of the institution of the Antitrust Litigation, the partial settlements, their membership in the class, and the procedures to follow if they wished to opt out. When it came time to notify the class of proposed additional settlements and a plan for distribution of the settlement fund in November, 1981, Judge Pollak again approved notice by first class mail and publication in *The Wall Street Journal.* Both of the courts

below held that class counsel accomplished the November mailing without negligence, and Zimmer's Petition does not ask this Court to review that holding.

This Court has already held that first class mail and publication satisfy both due process and Rule 23, *Phillips Petroleum Co. v. Shutts*, ____U.S.____, 105 S. Ct. 2965, 86 L.Ed.2d 628 (1985), and Judge Pollak's order, which class counsel carried out, was in accord with those standards. Zimmer claims, however, that class counsel owed it more than the carrying out of the trial court's order, fulfillment of the requirements of Rule 23, and satisfaction of due process. It argues that, because only 12% of the class members filed proofs of claim (which the record shows is an average return), class counsel should have followed up and attempted to communicate with the remaining 1350 class members (or at least with Zimmer).

Contrary to what Zimmer's Petition says, there is nothing in the record to suggest that class counsel knew the amount of each class member's potential claim or of Zimmer's potential claim. Proofs of claim often require claimants to prove their claims from numerous transactions involving many documents scattered among the books and records of a company, and that might be one among several reasons (including the potential claimant's own neglect) why a class member which had not opted out of a class might not file a claim. In this case the number of proofs of claim filed was well within a predictable range, and class counsel had no reason to think that the mailing had been ineffective, which in fact it had not. Newberg, *Class Actions*, Appendix 8-4, Table I at 206-09 (2d ed. 1985).

Zimmer asserts in its Petition that "it is part of the fiduciary obligation of the class attorney *to assure* that the client receives the information," Pet. for Cert., 13 (emphasis added). We are aware of no case in any jurisdiction which has imposed that burden on class counsel. Nor has Zimmer identified such a holding.

Class counsel caused seven copies of the November 10 notice to be mailed to Zimmer and, just as Zimmer received six copies of the June 1 notice, Zimmer probably received it, together with the published notice in *The Wall Street Journal*. To require class counsel in this case to follow up with every class member who did not file a proof of claim, or to calculate each class member's potential claim before the class member has done so, would create obligations which have not existed before. The holdings of the courts below that by carrying out the orders of the supervising judge and giving the members of the class the notice to which Rule 23 and due process entitled them, the respondents exercised the skill and knowledge customarily employed by class action practitioners were correct and in any event certainly do not present the sort of extreme and exceptional case that might warrant review.

CONCLUSION

The question presented is a question of state law, does not involve any conflict among any courts, involves a unique and fact-specific inquiry, and was decided correctly by the courts below. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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